Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*

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Professor Simon argues that a theory of racially prejudiced motivation can explain current racial equal protection law. He describes the values that would serve as the normative basis of such a theory and explains how the theory would operate. Simon sees many historically troublesome equal protection issues as involving difficulties in the evidentiary system through which prejudiced motivation can be proven, and he argues that the two most currently vexing problems in racial equal protection law—the constitutionality of so-called benign classifications and of actions that disproportionately disadvantage racial groups—turn upon the same question: Would the challenged action have been taken but for racial prejudice?

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INTRODUCTION

Should the question why a governmental body took an action be relevant to that action's constitutionality? The question of why an action was taken is, in one sense, necessarily implicit in any system of constitutional adjudication that requires the government to justify challenged actions. As it has developed over the past few decades, our system of adjudicating constitutional rights, under several important constitutional provisions, imposes upon the government a differentiated justification requirement. Sometimes the plaintiff's claim will be defeated by the government's showing that the challenged action is rationally related to some conceivable and legitimate legislative goal (the traditional rational relationship test). Sometimes the plaintiff will be successful unless the government establishes that the action was necessary to accomplish a compelling state interest (the newer strict scrutiny test). At still other times, the government must satisfy some as yet not clearly defined intermediate burden of justification (sometimes called rational basis with a bite). Perhaps, then, the appropriate question to ask is what function this differentiated justification system performs.

Different governmental actions produce different effects. On the one hand, our differentiated justification requirement may function to ensure that a challenged action's "good" effects compensate for its constitutionally "bad" effects. Perhaps the Supreme Court's understanding is that the Constitution disfavors in varying degrees a spectrum of potential consequences of governmental actions. Under this view, the relative badness of an ef-

fect, determined according to the Court's sense of the priority of constitutional values, determines the government's justification burden. An action producing a "very bad" effect is unconstitutional unless compensated for by an extremely good effect, a calculus presumably manifested by the "compelling state interest" formula. However, an action producing a slightly "bad" effect need only be shown to be rational, and so on.

On the other hand, perhaps the differentiated justification requirement, in some or in all the cases in which it is applied, functions as an evidentiary system through which the Court assesses the probable truthfulness of the government's explanation of its action. Perhaps, in other words, the Court understands the Constitution to prohibit actions only when they were probably taken because constitutionally disfavored considerations or values influenced the decisionmaking process. On this view, whenever the challenged action is one that culminated in enactment or promulgation of a rule, one would expect the rule itself at times to be extremely probative of the considerations that affected its enactment or promulgation. Similarly, one would expect that the effects produced by the action would at times be probative on the "illicit motivation" issue. Perhaps, then, the differentiated justification requirement functions to test the credibility of governmental denials that constitutionally disfavored considerations affected the decisionmaking process that culminated in different kinds of challenged actions. Thus, the variation in burdens of justification is simply a reflection of the differing degrees to which rules and effects are themselves probative of illicit motivation.

This article attempts to articulate and to explain the operation of just such a motivation theory of constitutional law in cases involving racially based equal protection claims. The article offers a theory under which a finding that a governmental action was causally affected by racial prejudice can be understood as both a sufficient and a necessary condition for holding the action unconstitutional. Thus, the two most pressing issues in racial equal protection law, the constitutionality of so-called benign classifications and of actions that disproportionately disadvantage racial groups, can be understood as turning on the same question: Would the challenged action have been taken but for racial prejudice?[1] The answer to this question is to a great extent de-

1. Although I view the prohibition against prejudiced governmental action as

pendent upon the facts of particular cases.

Although motivation analysis has been a major and recurring

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the normative heart and therefore by far the central protection of the equal protection clause, it can be argued that the clause should be read to include other norms as well and thus to warrant heightened judicial scrutiny of some types of governmental action that are not prejudicially motivated. If justified at all, however, such extensions of the clause must be taken with great care, for this is an area where high-priority principles often conflict.

The two main lines of argument for interpreting the equal protection clause to condemn governmental actions even when not prejudicially motivated come from quite different if not contradictory normative intuitions. One position would have the courts strike down at least some racially neutral actions that disproportionately disadvantage some racial groups unless the government establishes some special justification for the action. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). The other position would have the courts enforce a regime of "colorblindness" upon government, disfavoring racially benign actions to the same (or almost the same) extent as racially prejudiced ones. *See* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1. Disproportionate impact theories generally appeal to the principle that blacks and other similarly situated groups have a special entitlement to compensation for, or protection against, the continuing effects of past injustice. Colorblindness theories appeal to the principle that race-conscious governmental actions are at least a long-run evil.

Both these principles have moral force, and the difficulty with many arguments which might be premised on either principle is that they conflict with the remaining principle and often with other principles and policies as well. Thus, as Professor Ely has noted, disproportionate impact theories in effect tend to promote race-conscious decisionmaking, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1255-61 (1970) [hereinafter cited as *Motivation*], because an action would be presumptively unconstitutional if it in fact disproportionately disadvantaged blacks. Correspondingly, colorblindness theories tend to block compensatory programs for blacks because under them an action taken for racial reasons would be at least presumptively unconstitutional.

Moreover, many arguments premised on either principle also collide with important institutional values. Thus, a broad, rigorous compensatory justice theory of constitutional rights would result in the imposition of costs on groups of whites bearing no moral responsibility for the past injustices to blacks; whereas in general, our philosophy of adjudication cautions judges against transferring welfare to those who have been injured from others bearing no moral responsibility for the injury. Similarly, a broad or rigorous constitutional rule of colorblindness at least implicitly would involve judges in second-guessing political judgments on the basis of what are often complex issues of social fact—for example, whether the presence or the absence of compensatory programs for blacks is more likely to benefit blacks in the long run or is more likely to lead to racial politics or social divisiveness.

These moral and institutional ambiguities caution against major, intrusive extensions of the clause beyond its ban on prejudiced action. To the extent that disproportionate impact alone should lead to a judgment of unconstitutionality in the absence of prejudiced motivation, the most acceptable theory could be one like Professor Eisenberg's. *See* Eisenberg, *supra*. His theory would require proof of a causal nexus between a current condition of disproportionate disadvantage and prior "race-dependent" (or in my terms, racially prejudiced) action. *Id.*, at 64-68. Correspondingly, if governmental actions motivated by racially benign considerations deserve any additional constitutional screening, the justification burden

theme in constitutional law almost from its beginnings,[2] few of its persistent mysteries were even passably understood until the relatively recent work of Professors John Ely and Paul Brest.[3] Thus, creating the opportunity to take a position was not the main reason for the writing of this article. Rather, Ely's and Brest's insights, combined with the probably related changes in thinking now being manifested by Supreme Court opinions in this area,[4] seemed to make the time right for a more detailed look at the theoretical basis of motivation analysis and at how an analytical approach founded openly on a quest for illicit motives might actually operate. This attempt would not have been possible without Ely's and Brest's contributions, and if an occasional citation is missing or this fact is not otherwise obvious, I wish to state clearly how heavily in debt I am to their writings.

Unquestionably, this article falls short of its original goals. Most obviously, it expressly deals only with racial discrimination, although its theory seems potentially useful in understanding many other constitutional problem areas. Even more unfortunately, the article plainly gives inadequate attention to some components of the theory and problems in specifying its application. For example, its implications for the range of state action related problems are merely sketched out, as is its application to some particularly troublesome benign classification problems like tipping point quotas. Racial discrimination is an onion-like subject, with a new layer of mystery appearing as each preceding one is peeled away,

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should be considerably less than that demanded by the necessary to a compelling interest standard.

2. Undoubtedly, the best-known early suggestion that legislative motivation may be constitutionally relevant is Mr. Chief Justice Marshall's "pretext" passage in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). The best-known early contrary suggestion is the Court's discussion in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130-31 (1810).

3. Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 [hereinafter cited as *An Approach*]; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *Cf.* Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (assumes constitutional obligations will prevail over political interests); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (nothing suspicious about a majority's discriminating against itself).

4. Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

and in the end limitations of space, time, and comprehension simply loomed too large.

The article is roughly divided into two parts. The first part explains the normative theory that makes or ought to make the question of racially prejudiced motivation outcome determinative. It is, on the whole, rather abstract. The second part explains the evidentiary system within which the question of racially prejudiced motivation is or ought to be adjudicated. It is rather concrete, dealing first with overt racial prejudice and thereafter with covert discrimination.

The entire thesis is rooted in a vision of the equal protection clause as designed to remove racial prejudice from governmental decisionmaking processes. Although over the years numerous Supreme Court decisions have reflected this vision, it has never been more obvious than in *Strauder v. West Virginia*,[5] when the Court, sitting a decade after the passage of the fourteenth amendment, repeatedly emphasized that the point of the amendment was protecting blacks against governmental action based on "positive dislike,"[6] "unfriendly action,"[7] "an assertion of their inferiority,"[8] and "prejudice"[9]: "The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment."[10]

The Normative Theory: Racially Prejudiced Governmental Actions

The point of the equal protection clause has never been more succinctly or better stated than it was in *Strauder*. The clause prohibits racially prejudiced governmental actions,[11] a concept which is coextensive with racial discrimination. The former expression covers neither more nor less than does the latter. The judgment whether a governmental action is racially prejudiced requires an inquiry into the motivation or attitudes that led to the action. This requirement does *not* mean that a court should hold governmental action unconstitutional on the basis of the motiva-

5. 100 U.S. 303 (1880).
6. *Id.* at 306.
7. *Id.*
8. *Id.* at 308.
9. *Id.* at 308, 309.
10. *Id.* at 309.
11. This article's theory of racial discrimination is closely related to Professor Brest's theory of "race-dependent" decisions; my thoughts on the subject have been greatly aided by his work. *See* authorities cited note 3 *supra*.

tion behind it without regard to whether harmful consequences result. Rather, it means that a court's finding that governmental action was taken because of racially prejudiced attitudes amounts to a finding that the government has insulted or offended the dignity of group members against whom the prejudice was directed.

Moreover, racially prejudiced governmental actions may and often do cause other harms. However, even if a court finds that racial prejudice did play some role in the challenged governmental action, a court would not necessarily be warranted in finding that this prejudice caused other harms about which a plaintiff is complaining. For this reason, the remedy to which a plaintiff is entitled depends on whether the prejudice is causally connected to these other harms. To understand this sequence of propositions, we must begin by discussing the nature of racial prejudice. Thereafter, we turn to a normative account of the reasons why racially prejudiced governmental actions are constitutionally evil and then to a consideration of the remedial (and hence "causal") implications of this normative account. Finally, we give some relatively brief attention to the relationship between racially prejudiced attitudes and goals and the kinds of governmental decisions and the sources of prejudiced attitudes encompassed by the theory.

The Nature of Racial Prejudice

Racial (or ethnic) prejudice is an attitude or emotion composed of two essential characteristics: The group against which prejudice is directed is regarded negatively, and this negative attitude is categorical—that is, it is directed against anyone who is a member of the group simply because of his membership.[12] A person who is prejudiced has negative feelings about an individual

12. The literature on prejudice is voluminous. The two major works on the psychology of prejudice probably are G. ALLPORT, THE NATURE OF PREJUDICE (1954), and T. ADORNO, E. FRENKAL-BRUNSWIK, D. LEVINSON, & R. SANFORD, THE AUTHORITARIAN PERSONALITY (1969). Obviously, different authors have used different words to define prejudice, but it seems very unlikely that the limited claims made in the text of this article on the nature of prejudice would be regarded as controversial by scholars in the field. For quick reference, the interested reader might consult the summary of definitions of prejudice of 15 major works provided in H. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 3-4 (1973). Some other works of general interest on the subject include E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963); J. JONES, PREJUDICE AND RACISM (1972); J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1971); P. WATSON, PSYCHOLOGY AND RACE (1973).

who is a member of a disfavored group, notwithstanding the fact that she may never have met the individual and, indeed, may never have met or may have had little personal experience with other members of the group. She brings to any encounter a diffuse disrespect or dislike that either precludes or biases the sort of individuated evaluation she would make of one against whom she is not prejudiced.[13] If her prejudice is "dominative," her behavior may manifest some sort of aggressiveness; or if, as is probably more common today, her feelings are "aversive," she may seek to avoid members of the group.[14] Prejudice may fulfill some psychic or irrational need for an individual, or it may simply result from acceptance of custom or folkways which themselves may serve various social functions. Prejudice may also be reflected in a variety of behaviors and be subjectively experienced in a variety of ways.

A prejudiced person has both a disrespectful or disliking attitude toward the disfavored group and a set of accompanying factual beliefs (often called a stereotype), and it is important to distinguish between the attitude and its attendant beliefs. Thus, someone who is prejudiced against Jews or blacks will generally hold beliefs about these groups—for example, that Jews are clannish *or* socially pushy and that blacks are slovenly *or* dangerous. Such beliefs operate in two ways on the prejudiced person: They serve as self-justifications for his negative attitude, and they distort his perceptions and evaluations of individuals belonging to the disfavored group.[15] However, factual beliefs do not fully account for the prejudiced person's attitude. Often, as in the examples suggested, a prejudiced person holds several beliefs that are basically inconsistent. Both common experience and psychological research indicate that confronting a prejudiced person with evidence that contradicts his faulty beliefs will not necessarily alter his attitude. He may simply refuse to accept the evidence no matter how persuasive it is, he may switch to some other justifying but equally unsupported factual belief, or he may accept the refutation about an individual whose qualities are at issue but not change his belief about the group in general.[16]

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13. *See, e.g.*, E. GOFFMAN, *supra* note 12, at 9. For general discussions of prejudice, *see* G. ALLPORT, *supra* note 12, ch. 1; J. JONES, PREJUDICE AND RACISM 2-4, ch. 4 (1972); THE AUTHORITARIAN PERSONALITY, *supra* note 12, at 1-150.

14. J. KOVEL, WHITE RACISM: A PSYCHOHISTORY 31-34, 51-92 (1971). *See also* THE AUTHORITARIAN PERSONALITY, *supra* note 12, at 60.

15. G. ALLPORT, *supra* note 12, at 13, 23-24, 191-92; H. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 21 (1973); E. GOFFMAN, *supra* note 12, at 9; THE AUTHORITARIAN PERSONALITY, *supra* note 12, at 41, 46, 58, 62, 74-76, 92-94.

16. *See* authorities cited note 15 *supra*.

Thus the disrespectful or disliking attitude of prejudice is not defined by or equivalent to the factual beliefs that it includes. Prejudiced people hold the attitude as a value, and therefore, as we all do with our values, they search for and believe in empirical bases for it, and it, in turn, affects their perceptions of facts and ordering of reality. Because racial prejudice is an important value-attitude that is often widely shared within a society, some observers have persuasively suggested that it has the characteristics of an ideology. If so, it is an ideology that the equal protection clause seeks to remove from governmental processes.[17]

Why Racially Prejudiced Governmental Actions are Constitutionally Evil

Perhaps a normative account of the reasons why racially prejudiced governmental action is evil might rest simply on the claim that it is widely regarded as such in our society or that it violates the cardinal rule of fairness—the Golden Rule—or Kant's categorical imperative.[18] However, more can be said on this score. Because racial prejudice is marked by several relatively unusual characteristics, the normal functioning of democratic processes cannot adequately protect groups against which prejudice is directed.

Most of us probably believe that a governmental entity should not treat some people differently from others simply because many of its constituents dislike people of that sort or regard them as less worthy, and several constitutional norms in one way or another seem to reflect this judgment. However, at the same time, we may believe that governmental actions based partly on dislike for certain kinds of people are to some extent inevitable.

Racial prejudice, however, has qualities that cumulatively make it considerably more troublesome than most kinds of disrespectful or disliking attitudes. Perhaps because race plays an important role in the self-identification of individuals, racial dislikes seem more deeply rooted than do most others, almost as if they were some inextinguishable vestige of primordial man's instinctive dislike of clans or tribes outside his own.[19] Furthermore, they appear to have a close nexus to action—so much so that some stu-

17. G. ALLPORT, *supra* note 12, at 27; THE AUTHORITARIAN PERSONALITY, *supra* note 12, at 58, 74, 92.
18. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959).
19. *See, e.g.*, G. ALLPORT, *supra* note 12, at 107-10.

dents of prejudice have metaphorically described the attitude as one with a purpose or implying a readiness for action.[20] Moreover, racially prejudiced attitudes, to the extent that they are not acted out, are peculiarly likely to be kept hidden, both from others and from oneself, thus making them less vulnerable to change and more inclined to fester.[21] Finally, racially prejudiced attitudes, though of varying sorts and intensities, seem to be quite widespread, unlike many other dislikes that tend to differ according to an individual's tastes.[22]

These characteristics at least begin to signal racial prejudice as a special case of disrespect or dislike posing a potentially serious threat to the operation of democratic government. We cannot extend to this attitude whatever understanding we may have about the "legitimacy" of the government manifesting its dislikes in law, for this attitude is so deeply rooted, pervasive, action-ready, and insidious as to make it uniquely dangerous to groups against which it is directed.

Moreover, racial groups are different from others that may be the object of governmental dislike in ways that greatly aggravate the danger of unchecked majoritarian rule. For instance, racial groups historically have been "discrete and insular" minorities. Here discrete has a dual connotation. First, members of the group are relatively easy to identify as compared with others against whom majoritarian governments might be tempted to act out their dislikes—for example, the lazy, the ugly, the stupid, and the arrogant. Second, a racial minority is a discrete group in the sense that a dislike directed toward it does not necessarily extend to or threaten any other group, and for this reason relatively few common interests exist between the disliked and other groups. This discreteness, together with the pervasiveness and depth of racial prejudice, has historically made such groups insular in the sense that they have been excluded from the interest-group coalition system that drives the legislative process.[23]

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20. Of course, the likelihood that individuals will act out their racial prejudices varies among individuals and is dependent on the extent to which the culture promotes or condones racism. *See* J. KOVEL, WHITE RACISM: A PSYCHOHISTORY 31-34, 51-92 (1971).

21. Hiding the attitude from oneself is, of course, a major function performed by stereotyping. *See* authorities cited note 15 *supra*.

22. G. ALLPORT, *supra* note 12, at 74-79; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS pt. II (1968). A recent study of antisemitism indicates that prejudice is both widespread and persistent. C. GLOCK, R. WUTHNOW, J. PILIAVIN, & M. SPENCER, ADOLESCENT PREJUDICE 6-16 (1975).

23. Of course, the notion of political insularity is one of degree. Impossible to quantify, it varies according to time, place, group, and perhaps issue. Classical pluralist political theory, as represented, for example, in R. DAHL, WHO GOVERNS

As our nation's history demonstrates, racial prejudice can result in the systematic disadvantaging of certain groups—indeed, in sets of rules and institutional arrangements that operate culturally to subordinate some racial groups. This subordination is of course more pervasive than the occasional shifting of a group from the winner's to the loser's column on the legislative scoreboard. Besides tangible disadvantages in allocating private rights and public services, racially prejudiced governmental action produces an additional harm to the groups against which it is directed: It insults, stigmatizes, and demeans the dignity of group members.[24]

(1961), left small room for a concept of group insularity. This lack has been among its major criticisms. See the summary of classical pluralist theory and major attacks upon it in W. GAMSON, THE STRATEGY OF SOCIAL PROTEST 9 (1975). Professor Dahl himself appears to have come to accept this criticism in his third edition of *Pluralist Democracy in the United States: Conflict and Consent*, which he has retitled *Democracy in the United States: Promise and Performance*. Professor Dahl employs the organizing concept of "polyarchies" rather than of pluralism. Dahl expressly cautions that his analysis

> [a]pplies to the American polyarchy and persons permitted to participate in it—whites for the most part. It does not apply to those excluded from it, mainly blacks, nor to the hegemonic system used in the South (often with the tacit consent of the North) to deny influence to blacks.

R. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 54 (1976).

Blacks and other racial minority groups are no doubt less politically insular today than they were a generation ago. This is in part a result of their effective enfranchisement and may also reflect a more general decrease in racial prejudice, or at least an increase in the perception that one ought not to act in ways that make one's prejudice manifest. Alternatively, the apparent decrease in black insularity to some extent simply may reflect the general legal bar against overt racial classification and other forms of patently racially discriminatory state action. Because this bar operates in many contexts, it assures some degree of common interest between blacks and other groups. It effectively requires governments wishing to disadvantage blacks (or advantage whites) to do so through policies that to some extent disadvantage members of other groups (or advantage blacks) at the same time. To the extent that we believe the truth probably lies somewhere between these views, we may say that blacks are less insular than they used to be, but not that blacks (or Jews, for that matter) have now reached the point where they can fend for themselves in the political arena even without a constitutional bar against discrimination. *See* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS pt. II (1968). This view, which seems on balance the most sensible one, necessarily concedes that groups against which racial prejudice might be directed somehow are different from other kinds of groups with respect to the "normal" functioning of the democratic process. "Insularity" does not seem such a bad word to use to describe this difference. Under this view, one of the functions of the equal protection clause is structuring the rules of the game of democracy to reduce the insularity of certain groups precisely because we recognize the special dangers posed by prejudice.

24. The idea that segregation is unconstitutional because it is racially insulting was first suggested by Professors Black and Cahn. Black, *The Lawfulness of the*

The concept of racial insults and the cognate notions of stigma and dignitary harm describe a genuine hurt that human beings sometimes suffer. The reality and general nature of this hurt is easily understandable to anyone who has been called, or who can imagine what it feels like to be called, a "nigger" or a "dirty Jew." I suspect that not many would dissent from the proposition that for one human being to hurt another in this way is wrong and that an even greater wrong occurs when the government does the hurting.

Though the injury is real and understandable and the norm against it plain, the concept of racial insult is elusive and thus difficult to define or criterialize. The term *insult* seems to have no clearly established social usage. An individual may claim to have been "insulted" by a wide variety of actions. If no moral or legal consequences depend on his claim, society is inclined to accept his word. Perhaps we respond this way because in this circumstance we understand his claim of "insult" as simply another way of saying that his feelings have been hurt, as for example when someone says another has insulted him by not inviting him to a party.

However, when some moral or legal consequence does turn on whether someone has insulted another, we cannot and do not understand the question to be equivalent to whether the "insultee's" feelings have been hurt. When the insult occurs this way, we are called upon to make a judgment more complex than simply asking whether someone's feelings have been hurt. If, for example, the invitation list included only business associates and the excluded person was clearly not a business associate, we are unlikely to condemn the invitor.

The difference between insult as a synonym for hurt feelings and as a normative term seems to be this: We regard actions taken by others as insults in the latter sense only when, in addition to having hurtful effects upon self-respect or pride, we infer that the actor made the statement partly because he disliked us or wanted to hurt our feelings. Thus, the context in which another acts or speaks often determines whether we regard it as insulting. A friend might criticize someone with the avowed goal of helping her get along better with others. The criticism might hurt her friend's feelings, but it would not be understood as an insult so long as the one criticized accepted her friend's account of her goal or motive. If an enemy had made the same statement without explanation, it might well be taken as an insult. In other words,

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Segregation Decisions, 69 YALE L.J. 421 (1960); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

insult and cognate terms imply assessments of attitudes or goals—hence the excusal phrase "not intended as an insult." Consequently, if a third person (or a court) were called in to resolve a disagreement about whether one person had insulted another, the arbiter could not perform this task without assessing the attitudes or goals that underlay the action at issue.

A racial insult is an action or statement that hurts the feelings of racial group members and that we infer was taken or made partly because the actor disliked or disrespected people of that group. Consequently, if a court finds that racial prejudice played a role in the decisionmaking process leading to a challenged action, the action is by definition a racial insult. However, a governmental action might hurt the feelings of some group members and nevertheless not amount to a normative or unconstitutional racial insult if a court finds that prejudice did not infect the action.

Of course, some actions or statements become, through experience, so identified with racial prejudice that we regard them as almost per se racially insulting; but this phenomenon occurs only because our experience suggests that such actions or statements rarely are taken or made apart from racially prejudiced attitudes. The word *nigger* is an example. Notice, though, that even some uses of this prejudice-loaded word would not be normatively counted as insults. Consider, for instance, its use by a black comedian or a school teacher attempting to explain what prejudice is and why it is wrong.[25]

Some governmental actions, like the word *nigger*, are so identified with racial prejudice that we do not assess motivation when we brand them racial insults, stigmas, or dignitary assaults. For example, we can understand laws requiring racial segregation as racial insults without attending with great care to legislative motivation. The reason is not that such a normative judgment can be made without reference to motives, but rather that it seems obvious that such laws would not have been enacted apart from racial prejudice. The concepts of racial insult, stigma, and dignitary harm simply have no intelligible meaning that may be divorced from at least an implied assessment of motives.

25. For a sensitive discussion on the rites of initiation through which a white admitted to a black group must go before his use of the word *nigger* will be received as non-insulting, see E. GOFFMAN, *supra* note 12, at 29.

Remedial Implications and Causation

The constitutional prohibition against racial discrimination implements two basic norms. First, members of racial groups should not be disadvantaged because of a distortion of the democratic process resulting from racial prejudice ("process distortion"). Second, racial group members should not suffer the dignitary harm caused by racially prejudiced governmental action ("dignitary harm"). Both these norms make inevitable an assessment of motivation in racial equal protection cases, for neither is offended by action that is not racially prejudiced, even if this action disproportionately disadvantages a racial group.

There is, however, a difference between the two norms, a difference which can become significant whenever, as will virtually always be true, a plaintiff claims that a racially prejudiced governmental action harmed him in addition to insulting his dignity, and he therefore requests remedial relief of some sort with respect to this other harm. An action that a court finds was in any significant way prompted by prejudice is definitionally insulting, and for this reason proof that the action was so prompted simultaneously establishes a dignitary harm. Whether the plaintiff should be granted relief with respect to other harms produced by such an action is a more complicated question. The complication arises from the possibility that although racial prejudice did play some role, the governmental entity might have taken the same action even apart from prejudice.[26]

As this problem occurs in actual lawsuits, the critical issues are usually evidentiary: Did racial prejudice play any role in the challenged action, and if so, would the government have taken the same action apart from prejudice? We shall consider the evidentiary problems of and interdependences between these two issues later. For now, let us engage in some unrealistic evidentiary assumptions, which, though in some ways misleading, are at this point clarifying.

Consider a zoning board decision denying a variance for a low-income housing project. Although the board's stated reason for the denial is the incompatability between the project and the single-family dwelling character of the neighborhood, assume that a court knows to a certainty that the board also wanted to keep out of this white area the black population that the project would probably attract. Assume further, however, that the court also knows that the board would have denied a variance to any hous-

26. *See* Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

ing project or other property use in this exclusively single-family dwelling area despite the race of those affected.

Undoubtedly this governmental action violates the dignitary harm norm, for the court knows that action was taken partly on the basis of racial dislike and is therefore racially insulting. The fact that the action would have been taken for other reasons does not erase the insult; our judgment of whether we have been insulted depends on the reason for which an action was in fact taken.

If, for a moment, we back away from the judicial context and ask whether the zoning board members have violated their oaths to obey the Constitution by acting out of racial prejudice, the answer is surely that they have. Therefore, arguing the constitutional issue before the board would have been proper, as would be a constitutionally based appeal to the electorate in the next board elections. For the same reason, an inquiry into whether a proposed appointive office holder is a racial bigot—for example, if the question arises during Senate confirmation proceedings—seems proper and distinguishable from inquiries into candidate's other ideological positions.

Perhaps the courts should assign to unconstitutional governmental actions resulting from racial prejudice an operational meaning that differs from currently established judicial responses. Arguably, for example, firing government employees for making racially bigoted speeches should be treated differently for first amendment purposes than firings for other kinds of speeches.[27] Perhaps public officials should be subject to removal from office for taking racially prejudiced actions or be liable for punitive damages solely on the basis of the dignitary harm such actions occasion.

However, in our zoning board case, the plaintiff is likely to request from the court some specific relief requiring the board to grant the variance. The difficulty, of course, is that granting this relief not only will place the plaintiff in a better position than she would have been in had racial prejudice not affected the board's decision but also will preclude the board from taking an action that was within its constitutional power and that it would have

27. *But cf.* Linmark Assocs. v. Township of Wellingboro, 431 U.S. 85 (1977) (suppression of speech for purpose of promoting stable, integrated housing violated first amendment).

taken regardless of its prejudice. Perhaps, as we have noted, the courts could appropriately respond to this problem by developing some intermediate form of relief. The important point for our purpose is simply that, on our assumptions to this point, the court probably could not properly mandate that the zoning board grant the variance. In other words, in order for a plaintiff to be entitled to such relief, a court should be satisfied that the harm about which she complains (other than dignitary harm) would not have occurred but for racial prejudice. More generally, in order to grant relief on the basis of a violation of the process distortion norm, a court must find not only that the governmental action was affected by prejudice but also that it was "caused" (in the necessary condition sense) by such prejudice.[28]

Our preliminary cautions regarding the unreality of the evidentiary assumptions in this hypothetical deserve emphasis. The method of analysis that we used—raising legal questions on the assumption that motives are fully known—is probably responsible for considerable confusion in the law and literature of motivation analysis. We shall see later that the evidentiary inferences in which a court will necessarily engage when assessing whether racially prejudiced motivation played any role in a governmental action often simultaneously dispose of the causation issue. Even if the issues are evidentially distinguishable, we shall discover that when a plaintiff uses some kinds of evidence to prove that racial prejudice did play a role, good reasons exist for imposing upon the government a heavy burden of disproving causation.

Also worth emphasis is the fact that the causation issue's relevance depends entirely on the remedy the plaintiff is seeking. On the facts of our hypothetical, a court order that the agency reconsider its variance decision would be pointless, for we stipulated that the court knew that the board would make the same decision the second time. However, in actual cases a plaintiff's proof that racial prejudice influenced a governmental decision should, at a minimum, entitle him to such an order, although this remedy may not be the best one available.

Finally, we should distinguish this causation question from the different issue of what kind of "harm" a plaintiff must prove that he suffered in order to establish an equal protection violation that is judicially remediable. Professor Dworkin has argued that enforcing the equal protection clause requires courts to make "inter-

28. The Supreme Court's holding last term in Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), thus essentially was correct, although, as discussed later, the causation issue presents complexities that the Court appears not to have fully appreciated. *See* text accompanying notes 175-79 *infra*.

pretative" rather than "causal" judgments.[29] He also seems to view the clause as banning racially prejudiced action and argues that answering the question whether an action is prejudiced requires essentially that a court "interpret" the social meaning of such action. Once an action is found to be prejudiced, the court need not ask whether the action "caused" the plaintiff some measurable harm. Thus, for example, the Supreme Court in *Brown v. Board of Education*[30] need not have addressed the question whether segregated schools were educationally harmful to black children. All that was necessary was a finding that segregation was a consequence of racial prejudice.

Professor Dworkin may be read as suggesting that the question whether a plaintiff has been harmed by a racially prejudiced governmental action is simply irrelevant. However, the more accurate interpretation of Dworkin probably is that a racially prejudiced action is definitionally insulting and therefore harmful in the way that we suggested previously.[31]

There are three easily and often confused questions regarding the relevance of harm to the constitutionality of school segregation. The first is whether it is necessary for a court to inquire whether school segregation results in blacks getting an education inferior to that which they would otherwise receive. The second is whether it is possible to determine whether segregation is racially insulting to blacks without inquiring whether the practice is in any way harmful to them. The third is whether, if the plaintiff has requested an order desegregating the schools, it is relevant to the issuance of this remedy to ask whether the segregation would have been mandated but for racial prejudice.

Professor Dworkin's position on the first issue—that no inquiry into educational harm is relevant—is correct, but his reason for so believing appears to be based on what I think are incorrect responses to the second and possibly the third issues. Apparently, his position is that the question of educational harm is irrelevant because segregation itself is a racial insult to blacks. The first dif-

29. Dworkin, *Social Sciences and Constitutional Rights—the Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977).

30. 347 U.S. 483 (1954).

31. Dworkin, *Social Sciences and Constitutional Rights—the Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 11 (1977). Of course, the "racial insult" understanding of *Brown* had its roots in the much earlier work of Professors Cahn and Black. *See* authorities cited note 24 *supra*.

ficulty with this position is that it is epistemologically circular. How does Dworkin (or a court) know that the segregation is racially prejudiced and therefore an insult? His answer is that because of cultural influences, we almost instinctively respond in expected ways to certain societal phenomena: We understand, perhaps at a subconscious level, certain cause and effect sequences. We know that segregation is prejudiced the way we know "that a cold causes snuffles."[32] (The idea here seems to be that segregation is a "symptom" of racial prejudice like snuffles are a symptom of a cold.) This method of analysis is quite acceptable to me, but it is important to note that it implicitly accepts that the process by which we interpret segregation includes an assessment that the practice is "harmful" to blacks. We know not only that the practice of segregation, like the word *nigger*, hurts the feelings of blacks, but also, from our history and our cultural experience, that segregation is relatively disadvantageous to blacks both culturally and socially.

This assessment of the harmfulness of segregation is part of the information on the basis of which we know that the practice is racially prejudiced and therefore insulting. If we do not feel the need to ask a separate question about harm in a *Brown*-type situation, the reason is simply that the answer is obvious to a member of our culture, and it is for this reason that Dworkin is correct in suggesting that such segregation is a "symptom" of prejudice. In this sense, *Brown* is any easy case. Although the question of discrete educational harm should have been irrelevant in *Brown*, an implicit inquiry into whether segregation is culturally and socially disadvantageous to blacks is part of the *evidentiary* process through which we conclude that the practice is racially prejudiced and therefore insulting. Of course, cases much more difficult than *Brown* do arise, for example, those involving so-called benign classifications, in which an inquiry into whether an action is harmful to the racial group it purports to benefit is an important part of the evidentiary process through which we determine whether the action is prejudiced.

The second difficulty with the Dworkin position is that it apparently assumes that finding segregation racially prejudiced and therefore insulting justifies a desegregation order. The problem here, as we have seen, is that an action may have been affected by racial prejudice, even though it might have been taken if it were not so affected. Professor Dworkin does not address this

32. Dworkin, *Social Sciences and Constitutional Rights—the Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977) (quoting Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 161 (1955)). *See* Dworkin, *supra* at 3, 4, 11.

problem directly, and it plainly was not a real possibility in *Brown* and similar cases, as we shall discuss later. However, one might infer from some passages in his article that he believes that once an action is proven to have been affected—or even potentially affected—by racial prejudice, the question whether the same action would have been taken apart from prejudice should simply be irrelevant.[33] If this is Dworkin's position, I believe that he is wrong. If instead, he means that the evidence used to prove prejudice in some cases as a practical matter will eliminate causation as a distinct issue, or that special rules of evidence should be applicable when the issue is causation, he is right. However, the critical problem is delineating these evidentiary interdependencies and explaining and defining the circumstances in which different evidentiary rules are appropriate.

Attitudes and Goals

In virtually all racial equal protection lawsuits, the plaintiff claims that the governmental action he challenges violates both the dignitary harm and the process distortion norms. Therefore, he seeks judicial relief from some injury (in addition to the dignitary harm) that he claims is a consequence of the fact that racial prejudice distorted the decisionmaking process that led to the action. Because a causal connection between the prejudice and the harm that he wants remedied is a necessary element in finding that the process distortion norm was violated, the question for the court is whether the government would have taken the action but for racially prejudiced attitudes. It is this question that will occupy our attention for the remainder of this article.[34]

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33. *Id.* at 11-12.

34. There are important connections between the thesis of this article and a range of problems commonly associated with the state action doctrine. Although this subject is by and large beyond the scope of this article, two of the problems require explicit recognition: action versus inaction, and private prejudice.

The racial insult and process distortion norms are violated as much by racially prejudiced governmental inaction or failures to act as by prejudiced action. Of course, it will be difficult and often impossible for a plaintiff to prove that a governmental entity would have taken an action but for racial prejudice. If, however, the proof hurdle is overcome by a plaintiff, the theory of this article would indicate that a court should order the government to take the action it has failed to take. In principle, this conclusion would be true even if the consequence were an order requiring a legislative body to enact legislation, whereas values associated with the state action doctrine would seem to prohibit any such outcome.

The principal difficulty here is that it is none too clear what values are promoted by the state action doctrine, which historically has been a mystifying corner of

A finding that the government would not have taken a challenged action but for racially prejudiced attitudes is not necessarily equivalent to a finding that the action was taken in pursuit of racially prejudiced goals. It is possible and in some cases probable that the decision process through which an individual or a group determines to take an action can be so affected by prejudiced attitudes that the action would not have been taken but for these attitudes. Nevertheless, if we were somehow able to observe the decision process directly, we might not describe the action as taken in pursuit of a racially prejudiced goal. However, in the vast majority of actual cases, the evidence on the basis of which we would conclude that racial attitudes played a causal role will ordinarily be circumstantial, and because of what seems to be some sort of epistemological convention, we communicate this conclusion through the statement that the action was taken in pursuit of a prejudiced goal. Although the "goal" conclusion is

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constitutional law. The doctrine probably serves as a kind of catch-all for several values, different ones of which may be involved in any particular case. It seems quite clear that there is no satisfactory way of generically differentiating action from inaction that might suggest some principled distinction. Is an administrative agency's failure to issue a license action or inaction, and how, apart from the institutional difference, does it differ from a legislative failure to legislate? As this illustration suggests, the principal values involved in any purported distinction between action and inaction probably relate to institutional values and related problems in fashioning judicially enforceable remedies. Thus, an administrative agency's racially prejudiced license refusal is judicially remediable, and I argue throughout this article that prejudiced administrative refusals to modify or to discontinue policies should be as well, but a legislative refusal to legislate is obviously more complex. The issue plainly deserves more attention than can be given it here.

A second problem area is at least as troublesome. On the one hand, the racial insult and process distortion norms in principle condemn governmental actions taken not out of personal prejudice on the part of government officials but in response to the prejudiced tastes of their constituents or of consumers of public goods. On the other hand, by virtue of the state action doctrine, the equal protection clause does not itself prohibit "private" prejudiced action. The first task of a thorough analysis here, once again, would be to sort out the values promoted by this reading of the clause.

My suspicion is that this interpretation rests partly on the same general institutional and remedial considerations as the action-inaction distinction and also upon a special type of concern over individual liberty and privacy interests. Perhaps a main function performed by the state action doctrine is to remove from judicial (though not necessarily legislative) regulation prejudiced private acts which, though they might not themselves be constitutionally protected under, say, the freedom of association or the right to privacy, in some ways implicate such other constitutional interests. On this view, the judicial refusal to hold at least some forms of private discrimination (or governmental failure to outlaw private discrimination) unconstitutional rests on the notion that the accommodation of competing constitutional interests is best left, at least in the first instance, to the legislative branch. In any event, any attempt to sort out the values promoted by the state action doctrine and to consider what effect they should have with regard to different kinds of private discrimination and public action taken on the basis of private prejudice is beyond this article's scope.

unnecessary and in some ways even misleading, this article will in general adopt this convention.

The question whether racial prejudice played a role in a governmental action belongs to the family of "interpretive" questions that most of us often ask about our actions and the actions of others. In order to interpret behavior, we want to know whether an action was taken because of some attitude or in pursuit of some goal—for example, whether a person acted because he disliked someone else. At times we seek these answers because our culture regards the attitudes that influence actions as relevant to the latter's goodness or badness and at other times because we simply want a better understanding of our own or of someone else's actions.

Attitudes and emotions can affect actions in ways in addition to what we would normally think of as "goals." An effect resulting from an action is a "goal" of that action only when the person acted because he consciously desired to bring about that effect. On the one hand, an individual's action may be racially prejudiced in this goal sense if, for example, the person consciously acted to disadvantage or segregate a group because he dislikes its race. On the other hand, an individual's action can be racially prejudiced even when he did not act in conscious pursuit of prejudiced goals.

Actors, both individual and governmental entities, sometimes do not recognize the true attitudes that prompted their actions.[35] The familiar notion of "lying to oneself" reflects our understanding not only that people sometimes knowingly provide themselves with false explanations of their own behavior, but also, and more fundamentally, they sometimes cannot determine whether their own explanation is true or false. Absent genuine recognition they have at best an opinion about its truth or falsity. Our ability to deceive ourselves in this way is probably greatest with regard to attitudes and emotions such as racial prejudice that are powerful and complex and that we would rather not admit even to ourselves.

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35. *See, e.g.*, H. FINGARETTE, SELF DECEPTION (1969); Nisbeth & Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCH. REV. 231 (1977). Occasionally, the Supreme Court has frankly admitted that conscious goals are irrelevant. For example, in Hernandez v. Texas, 347 U.S. 475 (1954), the Court held that the jury commissioners' testimony that they did not discriminate on racial bases could not overcome the extremely disproportionate pattern of jury selection: "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Id.* at 482.

Indeed, this sort of self-deception is precisely the function performed by racial stereotyping. A governmental decisionmaker may believe that in taking a particular action he weighed only the non-racial costs and benefits of various alternatives and "just happened" to choose one that, for example, specially disadvantaged blacks. If a court is persuaded through circumstantial evidence that the non-racial costs and benefits would not have been balanced as they were but for the effects of racial prejudice, it should hold the action unconstitutional as clearly violative of the process distortion and dignitary harm norms. The court is in no sense required to make the further inference that the decisionmaker took the action in pursuit of the goal of disadvantaging blacks. Although the same circumstantial evidence supporting the inference that prejudice played a causal role will also support the goal inference, this inference may or may not accurately describe the decision process, and the former finding alone is a sufficient condition of unconstitutionality.

In an effort to facilitate communication, this article often adopts goal terminology; however, when we say that a particular governmental action was taken in pursuit of prejudiced goals, what we mean is that it would not have been taken but for racially prejudiced attitudes. Thus, for example, the Supreme Court's conclusion in *Loving v. Virginia*[36] that the legislature's "goal" in enacting a miscegenation law was to "maintain White Supremacy"[37] is acceptable to me not because I am entirely confident that either the legislators individually or the legislative body collectively acted in conscious pursuit of this precise goal, but rather because no serious doubt exists that such a law would not have been enacted but for racially prejudiced attitudes.

Normative and Evidentiary Issues

When a plaintiff claims that a governmental action amounts to unconstitutional racial discrimination, the only normative question for the court is whether the challenged action would have been taken but for racial prejudice. The dispositive normative question does not vary with the type of governmental action challenged, although the evidentiary issues may. In contrast, Professor Brest, though he appears no longer to subscribe to this view,[38]

36. 388 U.S. 1 (1967).

37. *Id.* at 11.

38. *An Approach*, note 3 *supra*. Professor Brest's more recent analysis indicates he now understands the suspect classification approach to function as a "proxy" for the more direct question of prejudiced motivation, Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7, 15 (1976), or as a "prophylactic against improperly made deci-

when writing his first article on motivation analysis[39] seemed at one point to suggest that the motivation question is appropriate in racial equal protection cases only when the plaintiff is challenging certain types of actions.

Brest suggests that the term *motivation analysis* was being used incorrectly to describe two different questions that courts ask. According to Brest, it should be reserved only for the second. These questions are: "(1) What (if any) operative rule is the decisionmaker systematically employing? (2) Why did the decisionmaker make a particular decision?"[40] As an example of cases in which the first question was at issue, Brest offers *Yick Wo v. Hopkins*.[41] There the Supreme Court found that the plaintiff had been denied a laundry license because of his race. This finding was based on an unexplained history of denying licenses only to Orientals. Other cases in which Brest sees the first question as the issue include those involving unexplained patterns of racially disproportionate effect in jury selection, employment, voter registration, and pupil-teacher assignment. Under this view, the issue in these cases is whether administrative bodies were using a "covert rule" to exclude or segregate racial minorities.[42]

Brest contrasts such cases with those in which the pertinent question centers on which criteria or objectives influenced the decisionmaker in taking the challenged action.[43] He classifies cases raising this issue into three groups. In the first, a rule requires the exclusion of blacks, but it is unclear whether a particular plaintiff was excluded because of this rule—that is, a college admissions officer "follows a rule" of excluding blacks but claims to have excluded the plaintiff on the basis of her grades without even knowing that she is black. In the second, the challenged administrative action was not rule-governed, but the plaintiff claims that the administrator took the action on the basis of racially impermissible considerations—that is, an admissions officer follows no rule of exclusion but had just experienced an unpleasant encounter with a black student and for this reason excluded the

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sions," *id.* at 15 n.65. Brest presumably now believes, contrary to at least some signals in his earlier work, *An Approach*, *supra* at 111-15, that the question of motive is basic in both overt and covert race cases.

39. *An Approach*, note 3 *supra*.
40. *Id.*, at 111.
41. 118 U.S. 356 (1886).
42. *An Approach*, *supra* note 3, at 111-12.
43. *Id.*, at 112-15.

next black applicant. In the third, the rule is not overtly racial, but the plaintiff claims that racially impermissible considerations influenced its enactment—for example, a legislative or administrative entity enacts an apparently neutral rule the true purpose of which is to exclude blacks.[44]

Professor Brest apparently believed that these two inquiries were different either analytically or in principle and that only the second involved a "motivation" question, for only it "focuses on the process by which the rule or decision was made."[45] The first inquiry, by comparison, "aims at determining the content of a covert rule; and an impermissible operative rule, whether it is overtly promulgated or concealed is substantively, and hence permanently, invalid."[46] Thus, a rule excluding blacks from college would be "substantively invalid," whereas excluding a black because of his grades would be permissible. A student's entitlement is merely to a process that does not exclude him because he is black.

Professor Brest recognizes that an evidentiary distinction also exists between these two kinds of inquiries. On the question of whether a decisionmaker is employing that which Brest terms a covert rule, evidence of historical-statistical racial effect patterns will be available. In contrast, such evidence will usually be unavailable in the other kinds of cases with which he is concerned, for the types of governmental actions these cases challenge are generally ad hoc or nonsystematic.[47]

The distinction to which Professor Brest has called attention is a useful one, but it does not have the principled or analytic significance that he apparently accorded to it, at least at that time. Rather, its importance is entirely evidentiary. Rules, whether racially overt or covert, and ad hoc governmental actions motivated by racial considerations are unconstitutional and remediable by courts under precisely the same circumstances—namely, whenever they are products of decision processes that have been distorted by racial prejudice.

Not all racially overt or covert rules are or ought to be unconstitutional, for not all would have been enacted or employed but for racial prejudice. A required racial census and at least some kinds of overt preferential treatment for blacks are examples of overt racial rules that ought not to be unconstitutional. On exceedingly rare occasions, an overt rule effected by prejudice should be up-

44. *Id.*, at 112-14.
45. *Id.*, at 115.
46. *Id.*, at 114-15.
47. *Id.*, at 114 n.104.

held if a court is entirely confident that the same rule would have been enacted even apart from prejudice. The same considerations apply to covert rules and to ad hoc governmental decisions, as, for example, in some circumstances, unannounced but systematically preferential treatment for blacks or an ad hoc determination to locate a school or housing project the purpose of which is in part to encourage racial integration.

None of these governmental actions—the racially overt or covert rules and the ad hoc decisions—are "substantively invalid" because with all, racial prejudice either played no role in the decision process, or, if it did, a court could confidently find that the same action would have been taken even apart from prejudice. By contrast, a rule excluding blacks from college is "substantively invalid," but only because it would be found to be a product of a racially prejudiced process, as would an ad hoc decision to exclude a black unless the college established that he was excluded only because of his grades.

Thus, the question whether the challenged governmental action would have been taken but for racial prejudice is *the* question that should determine the constitutionality of all governmental action, including both overt and, to use Brest's term, covert rules. Brest's description of cases in which the government was following a covertly discriminatory rule simply shows that in some situations the evidence establishes a pattern of decisionmaking inexplicable on any plausible basis other than that racial prejudice caused the challenged action. This evidentiary definition exhausts the meaning and significance of the category of covert rules. We shall see that the differences among other kinds of governmental actions that may be and often are challenged as racially prejudiced—for example, overt racial rules and various ad hoc actions—are also entirely evidentiary. The norms that apply, and consequently the question that courts should ask, do not differ depending upon the type of governmental action challenged.

THE EVIDENTIARY SYSTEM FOR PROVING RACIALLY PREJUDICED MOTIVATION

Because the determinative issue in a racial equal protection suit is whether the challenged action would have been taken but for racial prejudice, specifying the circumstances in which the courts should find a violation of the clause turns upon an evidentiary analysis: Which kinds of evidence should give rise to which

sorts of inferences, and how, in varying circumstances, should burdens of proof be allocated? A complete consideration of this problem would be almost impossible, for it would require discussing a virtually infinite number of potential governmental actions, attendant factual patterns, and forms of evidence. Therefore, the following comments are not intended to be complete, much less exhaustive. They are, rather, an attempt to outline the structure of evidentiary analysis in equal protection law and in so doing to explain how some traditional mysteries in this body of law can be clarified when viewed from an evidentiary perspective.

In theory, the logical place to begin is with a description and attempted classification of the various kinds of evidence that are relevant to and probative of racially prejudiced motivation. To begin here, however, would require, in advance of any detailed and concrete examples of the evidentiary system in operation, a relatively brief and abstract consideration of the full range of factual configurations within which racial equal protection claims may arise and be adjudicated. In the hope that a different organization will be more clarifying, we shall depart from this logic and begin by considering the actual operation of the evidentiary system for determining whether racially overt rules or actions would have been enacted or taken but for racial prejudice, focusing upon the suspect classification doctrine and its various implications for prejudiced and benign racial classifications.

Following this discussion, we shall move to the point at which we might have logically begun—namely, a description and classification of the more important kinds of evidence that are relevant and probative in the full range of equal protection cases. The classification offered is one that seeks to shed some light on the historical debate over "motivation" analysis in constitutional law—a debate that sometimes has seemed to concern the meaningfulness of asking a question about the motivation of a multi-membered institution and that at other times has apparently centered on the evidentiary ascertainability of "institutional motivation." Thereafter, we shall consider which evidentiary consequences, if any, should flow from the plaintiff's proof that a challenged action, although it may not have been racially overt, has produced a significant racially disproportionate impact. Finally, we shall give some abbreviated attention to the role of other kinds of evidence in this proof process, focusing upon the evidentiary system under which the "causation" issue should be adjudicated in cases in which it is clear that racial considerations have played some role in the challenged decision but less clear whether the same action would have been taken but for prejudice.

Strict Scrutiny and the Suspect Classification Doctrine

An assumption commonly made in equal protection cases is that all racial classifications are suspect and therefore unconstitutional unless shown necessary for accomplishing a compelling state interest or goal. Supreme Court decisions rightly support the proposition that all racial classifications are inherently suspect; however, they do not and should not support the additional proposition that all such classifications are unconstitutional unless necessary to a compelling goal. The fact that racial classifications are suspect means only that all racially overt rules should receive special judicial scrutiny, in the sense that a court should very carefully assess whether the rules would have been enacted or maintained but for racial prejudice, with the burden of credibly disproving such motivation upon the government. The statement that racial classifications are unconstitutional unless shown necessary to a compelling goal is a description of a rule of evidence applicable in some but not all cases in which a plaintiff challenges a racially overt rule.

The "suspiciousness" with which courts should treat racially overt classifications should and probably does extend to non-racially overt governmental action about which the plaintiff has come forward with some credible and probative evidence suggesting that racial prejudice may have affected the decision process leading to the action. It does not and should not follow that such evidence triggers the necessary to a compelling goal test, for this rule of evidence is not a sensible one for determining the racial prejudice issue in such cases. However, when the plaintiff has come forward with this evidence, the courts should never apply the standard equal protection "rational basis" test in adjudicating the action's constitutionality. Instead, the courts should demand of the government, as in the case of racially overt rules, a credible, nonprejudiced explanation of the action.

The kinds of government defensive claims and evidence that will discharge the burden of establishing a credible nonprejudiced explanation of such action vary. They vary depending upon the strength of the inference of prejudice warranted by the terms of the rule or admitted use of racial criteria and upon whatever additional evidence the plaintiff may submit. With regard to non-racially overt actions, that which will be necessary to discharge the burden depends upon the probative force of the plaintiff's evi-

dence of prejudice, which in turn is to some extent dependent upon the type of action challenged.

The evidentiary function and significance of the suspect classification doctrine cannot be understood apart from the actual cases in which the court fashioned it and the cultural reality out of which these cases grew. The rule emerged during a period when a substantial segment of the country enforced through the law a regime of racism known as segregation, and it developed in cases challenging that regime. This national experience strongly suggested that racially overt rules functioned almost exclusively to institutionalize an interlocking set of disadvantages—a separate and subordinated culture—for black and for other racially disrespected or disliked groups. Segregation was not a unique instance of racism in American culture, for it was predated by slavery and coexisted with the immigration period during which the signs of racial and ethnic prejudice by and against many different groups were obvious and widespread. The Supreme Court became institutionally familiar with the symptoms of prejudice not only in cases that dealt with segregation and other forms of overt racial discrimination but also in cases like *Meyer v. Nebraska*[48] and *Pierce v. Society of Sisters*[49] that involved indirect governmental responses to immigration.

In short, racial legislation in the United States was not a source of national pride at the time the Supreme Court seriously began to turn its attention to the problem. The suspect classification doctrine emerged during this period in cases challenging racially overt rules. The fact that the rules were racial in terms conclusively established that racial considerations were taken into account in the decision process. This same fact gave rise to a very strong, if not conclusive, inference that the rules would not have been promulgated but for these racial considerations, for it is difficult to believe that a decisionmaker who has conditioned private rights or governmental services on race would have imposed the same standards had he never considered race. Finally, and most importantly, our historical and cultural experience to the time gave every reason to believe that this racial motivation was prejudiced against, not beneficient toward, the minority groups singled out by the challenged rules. By virtue of historical and cultural experience, the Supreme Court could confidently identify certain types of racially overt rules as part of a regime of racism or as "symptomatic" of prejudice. Moreover, because of our historical and cultural experience, the Court could infer that those

48. 262 U.S. 390 (1923).
49. 268 U.S. 510 (1925).

rules that might not be clearly symptomatic but that nevertheless singled out minority groups for clear disadvantages were probably causally affected by prejudice.

Through the suspect classification doctrine, the Supreme Court was able to formalize the very high probability that laws the operation of which was expressly conditioned on race would not have been enacted apart from racially prejudiced attitudes. However, the Court was not willing to hold that all racial classifications were per se illegal because, presumably, it realized that a racial classification does not necessarily establish prejudiced motivation. Instead, it designated racial classifications "suspect," meaning that they are probative evidence of prejudice and hence of a violation of both the process distortion *and* dignitary harm norms. The critical issue is determining that which the government must establish in order to dispel this inference. Although the cases rightly make clear that the government must very persuasively show that the challenged action was not caused by racial prejudice, they differ about the types of evidence with which this defense can be proven.

Racially overt classifications that are clearly identifiable as symptomatic of prejudice or that single out a minority racial group or groups for clear disadvantage will be found to have been caused by racial prejudice unless the government establishes that the classification is "necessary to a compelling goal" other than one that is racially prejudiced.[50] This evidentiary standard has two important characteristics: First, it imposes upon the government an extraordinarily heavy burden of persuasion; second, it makes the determination of the prejudice issue entirely dependent on circumstantial evidence—that is, the issue is determined on the basis of the importance of the nonprejudiced goal that the government argues the classification serves and on the availability of alternative non-racial means by which this goal might be achieved. Evidence of "innocent" legislative history and the like is simply unavailing.

The heavy burden of persuasion that the suspect classification doctrine places upon the government reflects the high probability that these kinds of racial classifications were caused by prejudiced attitudes. When the challenged rule is conducive to a strong inference that it would not have been enacted but for ra-

50. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

cial prejudice, the Court rightly treats the rule as creating an almost irrebuttable presumption of prejudice. Only evidence that such a rule was necessary to the accomplishment of a compelling goal apart from prejudice is probatively forceful enough to dispel this presumption. In an analogous situation, extremely forceful evidence would be necessary to persuade us that someone who calls blacks "niggers" is not motivated by racially prejudiced attitudes.

The suspect classification doctrine's exclusion of all but circumstantial evidence simply reflects the fact that other forms of evidence are not sufficiently reliable to warrant the costs of reception.[51] Again, the problem is partly one of "lying," in that legislative history can be rigged and testimony deliberately distorted, and partly one of legislators not having been aware of the role prejudice played in their own actions. If a person who habitually calls blacks "niggers" testifies that his action was not affected by racially prejudiced attitudes, such testimony is frankly not very probative, and it does not become any more so even if we think he "really believes" that he is not prejudiced.

To repeat, the important point is that the "justification stage" of the suspect classification doctrine functions as an *evidentiary process* through which the court determines whether the government can persuasively dispel the presumption that prejudice causally affected the legislative or administrative process. If counsel defending a challenged classification of this sort were to admit that the purpose of a segregation requirement is to "keep the blacks in their place," he would supply the proof of prejudice for which the Court is looking. Therefore, he attempts to explain the classification by reference to some non-racial goal. The Court, however, realizing that the currents of racial prejudice, especially against blacks, have historically run deep in our society, finds it

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51. Perhaps a complete account of the cruciality of circumstantial evidence would also include some reference to the Supreme Court's supervision of the lower federal courts. At the time the suspect classification doctrine developed, many observers believed that lower court judges, especially in the South, were themselves so racially prejudiced that they could not be entrusted to protect the rights of blacks. Allowing conclusive weight to testimony by legislators, for example, that their actions were not affected by prejudice could have relatively insulated lower court outcome-determinative findings from appellate supervision. Exclusive reliance on circumstantial evidence reduces this problem considerably by virtue of the traditionally greater appellate court supervision over circumstantial inferences. The general problem of appellate supervision of lower court determinations concerning whether challenged action would have been taken but for racially prejudiced motivation is a pervasive problem in motivation analysis, and admittedly it may raise problems for the motive theory proposed in this article. This subject requires independent, extensive, and careful analysis and is, unfortunately, beyond this article's scope.

difficult to believe that such racial classifications would have been enacted apart from prejudice. The extraordinary justification requirement is a way of formalizing this thoroughly warranted skepticism.

In effect, the Court is saying, "We are going to assume that any racial classification that is symptomatic of prejudice or that singles out a minority racial group for clear disadvantage would not have been enacted but for prejudice. In order for the government to persuade us that such prejudice played no significant part in the law's passage, it must prove that (1) the law serves a nonprejudiced goal that is normally regarded as so important that we can with some confidence draw the inference that reasonable decisionmakers would have taken the challenged action to accomplish it whether they were affected by racial prejudice (the compelling goal requirement); and (2) alternative non-racial means for accomplishing this important goal are either essentially nonexistent or are sufficiently costly as to support the inference that reasonable decisionmakers would have chosen a racial classification to avoid these costs whether or not they were affected by racial prejudice (the necessary means requirement)."

The Supreme Court has applied the necessary to a compelling goal rule of evidence only in cases involving racially overt rules or regulations that are symptomatic of racial prejudice or that clearly single out a minority racial group to its obvious disadvantage. The dominant characteristic demanded of a Court confronted with required segregation in public facilities[52] or state bans on interracial sex and marriage[53] was courage, not analytic elegance. The celebrated cases dealing with these issues have been repeatedly discussed elsewhere and require no attention here.

The Japanese exclusion cases, *Hirabayashi v. United States*[54] and *Korematsu v. United States*,[55] are more difficult. Both in-

52. Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (prisons); Johnson v. Virginia, 373 U.S. 61 (1963) (courtrooms); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Brown v. Board of Educ., 347 U.S. 483 (1954) (schools).

53. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

54. 320 U.S. 81 (1943).

55. 323 U.S. 214 (1944).

volved challenges to the wartime exclusion of people of Japanese ancestry from the West Coast—racially overt rules that clearly singled out a minority group for disadvantage. In *Korematsu* we find the genesis of the suspect classification doctrine and the occasion of Justice Black's statement for the Supreme Court that "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[56] Yet the Court sustained the challenged government actions in both cases.

The key question in these cases, though not one the significance of which appears to have been fully appreciated by the Court, concerned the constitutionality of the government's failing to respond to changing circumstances by repealing *or* at least declining to enforce laws and regulations the enactment of which may well *not* have been caused by racial prejudice. The Japanese bombed Pearl Harbor on December 7, 1941. On December 8, 1941, Congress declared war against Japan, and between this time and late March, 1942, Congress, the President, and the military promulgated the various rules and regulations attacked in the cases.[57] *Hirabayashi* was prosecuted for a violation that occurred in mid-May, 1942,[58] and *Korematsu* for a late-May violation.[59] The former case reached the Supreme Court in the spring of 1943, the latter in the fall of 1944.

In both cases, the Court adamantly refused to question whether the government's fear of imminent Japanese invasion and sabotage turned out to be "true" or well-founded as of the trial date or of the date of Supreme Court review. Instead, both Courts confined their attention to "the conditions with which the President and Congress were confronted in the early months of 1942,"[60] insisting that the question was whether the government had "ground for believing"[61] that there were disloyal members of the population and "that in a critical hour such persons could not readily be isolated and separably dealt with."[62] The *Hirabayashi* Court discussed at some length the national security considerations supporting the government's actions,[63] and the *Korematsu*

56. *Id.* at 216.
57. In *Hirabayashi*, the regulation under attack imposed a curfew on all persons of Japanese ancestry residing on a military base. 320 U.S. at 83. The regulation attacked in *Korematsu* excluded all persons of Japanese ancestry from "military areas." 323 U.S. at 215-16.
58. 320 U.S. at 84.
59. 323 U.S. at 220.
60. 320 U.S. at 93.
61. *Id.* at 218.
62. *Id.* "We cannot—by availing ourselves of the calm perspective of hindsight—now say at the time these actions were unjustified." 323 U.S. at 224.
63. 320 U.S. at 92-99, 101-02.

Court included this discussion by reference.[64] Neither Court apparently regarded the approximately two-month period between the promulgation of the regulations and the time of violation as significant, *Hirabayashi* sustaining the "curfew order as applied, and at the time it was applied,"[65] and *Korematsu* sustaining the exclusion order "as of the time it was made and when the petitioner violated it."[66]

If we assume that these were the only times at which racially prejudiced motivation was constitutionally relevant, the Supreme Court's decisions are understandable, not on the unrealistic ground that racial prejudice played no role in the promulgation of the rules and regulations, but rather on the ground that prejudice did not play a causative role. Under this view, the critical question was whether the government would have taken the same action even apart from prejudice against Japanese. It was this question that the Court, on the basis of what it regarded as the government's well-founded and good faith fears in the wake of Pearl Harbor, answered with a "yes":

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen . . . because of racial prejudice. . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire . . . .[67]

In these cases the Court did not ask the subsequently formulated necessary means or less restrictive alternative question. However, on our time assumption, asking this question would not necessarily have affected the case's outcome. Again, it might well be true that with the benefit of hindsight, including of course the knowledge that the feared invasion never occurred, an objective observer would conclude that the military might have pursued its goals as efficiently by using non-racial means—for example, general loyalty screenings; but on this assumption, the judgments from hindsight were not dispositive. The issue was whether, given the fears and perceived emergency at the time the regulatory regime was promulgated and the violations occurred, the Supreme Court could reasonably conclude that the military would have

64. 323 U.S. at 217-18.
65. 320 U.S. at 102.
66. 323 U.S. at 219.
67. *Id.* at 223.

chosen a racial means over more cumbersome and time-consuming alternative means even apart from racial prejudice.[68]

The Japanese exclusion cases, in sum, illustrate that on rare occasions even a racially overt rule whose promulgation cannot realistically be found to be completely independent of prejudiced motivation can be constitutional because, given a reasonably perceived emergency at the time of its promulgation, it is credible that the government believed it a necessary means to accomplish a compelling goal independent of prejudice. In the Japanese exclusion cases or in any case in which racial prejudice played a role in an action that a court is persuaded would have been taken anyway because of some reasonably perceived emergency, the basic problem is determining which constitutional consequences should follow after the emergency is over. Suppose, for example, that the various exclusionary rules and regulations were kept in force following the end of the war and that the defendants were prosecuted for a violation in 1947. At a minimum, a decision to prosecute in these circumstances should clearly be held to be motivated by racial prejudice, for no other reasonably plausible explanation would exist for this exercise of discretion. Furthermore, a legislative refusal to repeal or rescind the racially exclusionary rules in this situation would be virtually impossible to explain on grounds other than racial prejudice, and the Supreme Court probably has adequate powers to remedy this wrong by simply enjoining the operation of the exclusionary system.[69] The Japanese exclusion cases are thus most troubling not because the Court found that the challenged rules would have been promulgated even apart from prejudice, but because it refused seriously to consider whether maintaining the exclusionary system and continuing its enforcement as of the time the cases reached the Court could be explained on grounds other than racial prejudice.

We can usefully contrast the segregation, miscegenation, and Japanese exclusion cases with three decisions involving racially overt rules in which the Supreme Court did *not* invoke the neces-

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68. The *Korematsu* Court stated:

> Here, as in the *Hirabayashi* case, . . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Id. at 218.

69. *See* note 34 *supra.*

sary to a compelling goal test: *Anderson v. Morton*,[70] *Morton v. Mancari*,[71] and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[72] The plaintiffs in *Anderson* challenged a Louisiana statutory requirement that the race of each candidate for public office appear opposite his name on the ballot. The Supreme Court did *not* say that all racial ballot designation requirements are per se unconstitutional. Nor did the Court even say that the challenged racially overt rule was "suspect" in the sense that its constitutionality was to be determined under the necessary to a compelling goal standard. However, in holding it unconstitutional, the Court did scrutinize the challenged statute more closely than would be required under the rational basis test.[73]

The racially overt statute challenged in *Anderson* did not trigger the necessary to a compelling goal rule of evidence because the statute could not be clearly identified as a symptom of prejudice or as an obvious disadvantage to blacks. Under some circumstances racial ballot designations might be designed to protect blacks in voting majorities against demonstrable white manipulation, and this situation would present a different case. Nonetheless, because the challenged rule was racially overt, the Supreme Court correctly regarded it with suspicion and in effect found that the government had not carried the burden of disproving prejudiced motivation, noting that the statute was passed in 1960 and had to be understood in light of the widespread racial prejudice then existing in Louisiana.[74]

The other two cases, *Morton* and *U.J.O.*, involved so-called benign racial classifications—the former, the Bureau of Indian Affairs (BIA) employment preference for Indians, and the latter, a racial reapportionment of voting districts designed to enhance black voting power. Later we shall discuss these cases at some length. For now, suffice it to say that although neither the unanimous *Morton* Court nor six of the eight Justices participating in the *U.J.O.* case characterized the racial classifications as "suspect," they did closely scrutinize the challenged actions for signs

70. 375 U.S. 399 (1964). *Cf.* Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam) (separation of persons on government lists on basis of race unconstitutional; listing of race on divorce degrees constitutional).
71. 417 U.S. 535 (1974).
72. 430 U.S. 144 (1977).
73. 375 U.S. at 403-04.
74. *Id.* at 403.

of racial prejudice, but *not* by using the necessary to a compelling goal rule of evidence.

Racially Benign Motivation

Neither the dignitary harm nor the process distortion norm outlaws all governmental actions taken on the basis of racial considerations or for the accomplishment of racial goals. The norms condemn government actions only when they result from racial prejudice. The distinction in principle is clear enough.[75] The difficulty is in determining whether an action affected by racial considerations was or was not affected by prejudice. This is an evidentiary problem, and, not surprisingly, there are both relatively easy and difficult cases.

We have seen that racially overt rules or actions that are symptomatic of prejudice or that single out a minority racial group for clear disadvantage give rise to an almost irrebuttable presumption of prejudiced motivation. However, not all overtly racial rules or actions warrant this strong presumption of prejudice, and, consequently, some should not trigger the necessary to a compelling goal rule of evidence. Consider, for example, the BIA employment preference for Indians upheld in *Morton v. Mancari*,[76] the law and medical school admissions preference for blacks and for other designated racial minority groups involved in *DeFunis v. Odegaard*[77] and in the *Bakke*[78] case, the racial reappointment designed to enhance black voting strength upheld in the *U.J.O.* case,[79] and the nonconstitutionally required decision by local school authorities to integrate the schools apparently approved in *Swann v. Charlotte-Mecklenburg Board of Education*.[80] The racially overt rules or actions challenged in these cases are obviously not culturally symptomatic of racial prejudice, and they do not single out a minority racial group for clear disadvantage. Quite the contrary, actions like the first three appear to single out such groups for advantages, and the final one, to integrate rather than segregate races. For this reason, the racially overt actions in *Morton* and *U.J.O.* and in the *Swann* dicta did not and those in *Bakke* should not create the strong presumption of prejudiced motivation that triggers the necessary to a compelling goal rule of

75. *See* note 1 *supra*.
76. 417 U.S. 535.
77. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded as moot*, 416 U.S. 312 (1974).
78. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977) (No. 76-811).
79. 430 U.S. 144 (1977).
80. 402 U.S. 1 (1971).

evidence.[81]

Racially overt rules like these, however, are not and should not be immune from close judicial scrutiny. The possibility is sufficiently great that any overt racial rule, despite its facial appearance, was so causally affected by prejudice as to warrant careful judicial review. The probability that such actions were caused by prejudice is not as great as in the case of strong presumptively prejudiced rules, and for this reason evidence that falls short of satisfying the necessary to a compelling goal standard can be sufficiently reliable and forceful to negate the possibility that the rule was caused by racial prejudice. The burden of proving that a racially overt rule was not motivated by prejudice should always rest with the government, so that in doubtful cases the rule should be struck down. How much and what kind of evidence is necessary to satisfy this burden depends upon the extent to which the terms of the challenged rule or other evidence produced by the plaintiff give rise to a fair suspicion of prejudice.

It is always possible that an overt rule that facially singles out racial minority groups for special advantages was in fact motivated by racial prejudice against any of three groups. First, the action might have been motivated by prejudice directed against the general majority group not entitled to the advantage. The conferral of an advantage upon blacks or upon blacks together with other minority groups like Asians and Chicanos might have been motivated by prejudice against the general white majority group. Second, the action might have in truth been motivated by

81. For general discussions of the so-called benign discrimination problem, *see generally* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). Most of the law review literature has focused on the higher education preferential admission issue. A substantial sampling of the literature includes: Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969); Bell, *In Defense of Minority Admission Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Flaherty & Sheard, DeFunis, *The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745 (1974); Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970); O'Neil, *Preferential Admission: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975). In addition, two entire law review issues, each containing several articles, are devoted exclusively to this issue: 75 COLUM. L. REV. 483 (1975); 60 VA. L. REV. 917 (1974).

prejudice against the racial minority group that it appears to advantage. Appearances are at times deceptive, and closer analysis may suggest either that an apparent or arguable advantage is really a disadvantage or that the advantage has been "packaged" in such a way that it manifests symptoms of racism. Finally, the action might have been motivated by prejudice against some subgroup not entitled to the preference. This subgroup might be either a part of the white majority, like Jews or Italians, or an excluded minority subgroup like Indians. For these reasons, all racially overt rules should be carefully scrutinized by the courts, with the government bearing the burden of credibly establishing that a challenged rule pursues nonprejudiced racial goals.

The Supreme Court's decisions in *Morton* and *U.J.O.* do not avowedly rest on the analytic approach suggested here, though they are essentially consistent with it and quite difficult to explain coherently in other terms. In *Morton*, for example, the Court rejected a constitutional attack on section 12 of the Indian Reorganization Act, which grants employment preferences in the BIA to Indians, effectively exempting them from competitive civil service requirements.[82] The Court quite rightly held that the "preference does not constitute 'racial discrimination,' "[83] but it reached this conclusion on the basis of a mystifyingly disingenuous analysis:

> Indeed, it is not even a "racial preference." Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. . . . Here the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.[84]

The Supreme Court was correct in concluding that the preference did not amount to racial discrimination, but the reason is not that it was not "racial" or that it served a "nonracially based goal." Indeed, the main body of the *Morton* opinion suggests that the Court was itself uneasy with these characterizations, for its rather careful analysis of the preference's historical background and legislative history would hardly have been necessary under the traditional rational basis test that presumably would be applicable if there were nothing "suspicious" about the challenged law. The preference was available only to individuals who were members of a federally recognized tribe *and* "one-fourth or more degree Indian blood."[85] If a rule excluding everyone who fails to meet a specification as to racial lineage is not a "racial classifica-

82. 417 U.S. 535. *See* 25 U.S.C. § 461 (1976).
83. 417 U.S. at 553.
84. *Id.* at 553-54.
85. *Id.* at 553 n.24.

tion," it is difficult to imagine what is. Similarly, the preference's goal as correctly characterized by the Supreme Court—"Indian self-government"[86]—is obviously not a "nonracial" goal.

The BIA employment preference did not amount to racial discrimination because it was not motivated by racial prejudice. The preference at issue in *Morton* singled out Indians for special advantage, whereas the earlier racially overt rules that reached the Court had singled out blacks or other racial minorities for disadvantage. This difference has two significant evidentiary implications for determining the prejudiced motivation issue. First, it is considerably easier in general to believe that the government might have reasons independent of racial prejudice for advantaging Indians (or blacks) relative to other groups than it is to believe that it might have nonprejudiced reasons for advantaging whites relative to blacks or for segregating these groups. Second, while Indians, blacks, and indeed virtually all racial or ethnic subgroups are political minorities, "whites" as a group comprise a majority both in the population at large and in Congress. For reasons that Professor Ely has elaborated,[87] it is not very believable that the white majority group will take actions based on prejudice against itself.

Both these probabilities are founded upon common knowledge of our own historical and cultural reality. Imagine that a typically largely white legislative or administrative body is choosing between two alternative employment tests, both of which will admittedly produce equally qualified work forces and are otherwise equivalent in cost. The only difference is that test *A* would result in virtually no Indian (or black) workers being hired, and test *B* would result in a work force that would be ten percent Indian (or black). If test *A* were chosen, most people who have lived in our culture for any length of time would be suspicious that prejudice against Indians (or blacks) played some role in the decision. However, choosing test *B* would not generate a comparable sus-

86. *Id.* at 551.

87. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). It is not nearly as improbable that some members of racial minority groups will be prejudiced against members of their own groups because it is more likely that they will internalize the prejudiced attitudes of the wider society, as the Court appears to have recognized in Castaneda v. Partida, 430 U.S. 482 (1976). *Cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (the famous "hearts and minds" passage). For a discussion of minority group self-hate, see G. ALLPORT, *supra* note 12, 150-53; E. GOFFMAN, *supra* note 12, at 32-40.

picion of racial prejudice against whites. The reason for suspicion in the first case is that, on the one hand, we have ample reason to believe that many whites are prejudiced against groups like Indians and blacks, and on the other, it is simply difficult to describe some reason for preferring whites that does not imply a relative racial dislike of Indians (or blacks). In the second case, by comparison, we have little reason to believe that whites are prejudiced against whites, and it is easy to imagine plausible reasons, independent of prejudice against whites, for preferring Indians (or blacks)—namely, to remedy the continuing adverse effects of prior dealings with Indians (or blacks) that are now regarded as unfair or immoral; to enhance the social position, status, and self-respect of economically, socially, and politically subordinate racial groups; and to take at least some small steps toward integrating our still racially splintered society so that perhaps our grandchildren's grandchildren will live in a nation where racial identity is not necessarily irrelevant but where prejudice no longer exists and words like *nigger* are no longer necessary to describe the way people feel about each other.

In other words, the difference between *Morton* and prior cases involving racially overt rules is the degree to which the challenged rules, given this background of culturally based, common sense probabilities, were themselves probative evidence of racially prejudiced motivation. What differentiates *Morton* from these earlier cases is that the challenged rule itself was not very probative of prejudice, and for this reason the government was both allowed and able to prove that the preference was not enacted out of prejudice through evidence that, though credible, would not have qualified under the necessary to a compelling goal standard. We shall call a racially overt rule or action that does not itself warrant a strong presumption of prejudice a *facially benign* classification.

The plaintiffs in *Morton* did not offer any evidence suggesting that the preference discriminated against them as members of any racial subgroups or that it discriminated against Indians. Their claim was that the preference discriminated against them as members of the excluded white majority group. Of course, no doubt existed that whites were excluded from the preference, but this exclusion would have amounted to "racial discrimination" against whites only if motivated by anti-white prejudice. The government claimed that the preference's goal was to make the BIA, the entity that effectively governs Indians, more responsive to its wards. Obviously, nothing about this goal implies any racial dislike or disrespect for whites. The sole question in the case was

whether this nonprejudiced account of motivation was credible. Notwithstanding the Supreme Court's rather mystifying assertion that the preference and its goals were "nonracial," the Justices in fact examined the preference's facial terms, the historical, social, and political context in which it operates, and its legislative history to conclude that the government's claimed racially related but benign goal was credible.[88]

In a *Morton*-type challenge to a preference, the plaintiff always has the option of attacking the factual basis of the allegedly benign goal, claiming that the social problem to which it is addressed is not real or, even if it is, that the racial preference cannot be regarded as a valid response. In cases in which such claims are advanced, if they are at all facially plausible, judicial reliance upon, for example, legislative history often will not be satisfactory. This situation can occur when the plaintiff is able to cast some doubt on the truthfulness of the facts on the basis of which the action was allegedly taken or in some other way is able to raise an inference that the legislative record was distorted or otherwise not fairly representative of actual motivation. A record of legislative or administrative proceedings consistent with benign motivation should, of course, always be supportive of an inference of nonprejudice, but it should, nevertheless, not be beyond impeachment by other circumstantial evidence. Moreover, in many cases, no such record will exist.

A plaintiff's plausible claim that the allegedly benign goal or racial classification lacks a factual basis should shift the burden of proof on this issue to the government. Such a claim, if it were not disproven, would substantially impeach the allegedly benign goal claim and therefore strongly support an inference of prejudiced motivation of one of the three previously mentioned varieties. In a case like *Morton*, when the action has been taken by a mainly white Congress, the probability of anti-white prejudice remains remote; but such evidence would be quite probative of prejudice against either the apparently benefitted group and/or, if additional evidence existed, some subgroup not entitled to the preference.

A claim that a facially benign classification (except for one that is exceptionally bizarre) was motivated by prejudice against subgroups is a species of "covert discrimination" attack with which

88. 417 U.S. 535, 541-45, 551-55 (1974).

we shall deal in a later section. Aside from a classroom hypothetical expressly granting preferential treatment to virtually every racial and ethnic group except, say, Italians and Asians, the benign classification will not facially contain any evidence of subgroup prejudice. A preference for blacks and Orientals does not itself suggest, for example, antisemitic or anti-Chicano motivation. For this reason, the process of determining whether a benign classification was motivated by subgroup prejudice involves evidentiary considerations substantially the same as those involved in deciding whether a law or other governmental action that is racially neutral on its face was in fact covertly motivated by prejudice against some racial group. Although this problem, as we shall see, has usually arisen in connection with protecting blacks, the equal protection clause obviously covers members of any group who can make the requisite evidentiary showing suggesting prejudice against their race.

The only general difference between discrimination attacks on racially neutral actions and excluded subgroup attacks on benign classifications arises, on the one hand, because the latter can be (though are not necessarily) a more effective and therefore easier way of fencing out racial groups than are the former,[89] and on the other hand, because either the allegedly benign goal or the racial classification as a way of achieving it can appear (though not necessarily) very peculiar.[90] These differences will be appropriately reflected in the *evidentiary posture* of a subgroup covert discrimination attack on a facially benign classification, for they can affect the extent of provable disproportionate impact and, in the face of some evidence supporting a subgroup prejudice claim, the credibility of a claimed benign goal.[91] This statement is not made to suggest that every racial or ethnic group has an equal probability of proving that a facially benign classification was motivated by subgroup prejudice, but the differences in the chance of successful proof reflect the probability in our contemporary culture that prejudiced governmental action is likely to be taken against the group which is at issue. Thus, an attack on a preference for blacks

89. Obviously, benign classifications are not necessarily more likely than racially neutral classifications to disadvantage racial subgroups. For example, of those displaced by a 10% law school preferential admission quota for blacks, half might be Jews, resulting in a small decline in Jewish admissions. By contrast, a local residency requirement for admission, neutral on its face, might exclude virtually all Jews.

90. For example, a claim of some type of compensatory justice goal for a preference for racial or for ethnic groups the members of which are, by all available empirical evidence, socially well-accepted and well-integrated and normally distributed among socioeconomic classes would appear peculiar. For a general discussion of "peculiar" goal claims, *see* notes 157-66 and accompanying text *infra*.

91. *See* notes 141-74 and accompanying text *infra*.

on the grounds of anti-Irish motivation and an attack on a preference for Irish on grounds of anti-black motivation are both species of covert discrimination claims, although in an actual case (should one ever arise), the probability of the two plaintiffs successfully proving their claims is obviously not the same.[92]

However, the facial terms of a *Morton*-like preference do give rise to some suspicion that it might have been motivated by prejudice against the apparently benefitted group, and for this if for no other reason a plausible claim by the plaintiff that the allegedly benign goal or racial classification lacks a factual basis should shift the burden of proof to the government. Because here the function of the required proof is to provide factual substantiation for the government's benign goal claim, shifting the burden in this way will also provide a check against anti-white and subgroup prejudice. The reason that a *Morton*-type preference gives rise to some suspicion of prejudice against the apparently benefitted group is that it exempts this group from some skill-related qualification required of non-benefitted group members and is consistent with a prejudiced motive to create the impression that the benefitted group is inferior.

To say that such a preferential exemption is consistent with prejudiced motivation is not to suggest that a classification of the sort involved in *Morton* fairly gives rise to a strong inference of prejudice, for quite obviously it does not. A common sense knowledge of our own culture suggests that it is at least as probable that without the exemption Indians would have failed to qualify for BIA employment at a significantly higher rate than did other racial groups. If this is true, the probable reason for the preferential exemption is simply to permit accomplishing the nonprejudiced goal of increasing BIA responsiveness to Indians. In this event, it would be no more sensible to describe the government as acting in order to "create the impression that Indians are inferior" than it would be to so describe its motivation had it refused to create the exemption, for such a refusal would amount to knowingly sanctioning a system that rejects Indians on skill grounds, thus "creating the impression they are inferior." Perhaps both these approaches would in fact foster the impression that Indians are "inferior," though this concept is rather elusive, and even if it were descriptively accurate, it does not follow that either action

92. *Id. See* note 90 *supra.*

would have been motivated by dislike or disrespect for Indians. Moreover, it is exceedingly difficult to take seriously the notion that enacting the exemption would somehow create a stronger impression of this kind than already existed when, prior to the enactment, virtually no Indians met the civil service standard.

If, however, the preferential exemption was essentially unnecessary, the notion that it was prejudically motivated becomes more realistic, for it might then amount to a gratuitous insult to Indians. For this reason, upon a plausible claim by the plaintiff, the government should be required to produce evidence sufficient to establish that the social problem to which the preference is addressed is real and that its choice of a racial classification to redress this problem was based on genuine considerations suggesting the classification's efficacy.

Given the relative weakness of the inference of prejudice generated by facially benign *Morton*-type preferences, the burden upon the government is not and should not be very onerous. All that the government should be obliged to demonstrate is the existence of a credible factual basis for its claimed nonprejudiced goal and for the racial means used to pursue this goal. If it cannot establish facts on the basis of which a reasonable person would conclude that the problem to which the classification was allegedly addressed can fairly be regarded as real, the court should find that the claimed goal is not credible and, absent some other persuasive explanation, hold that the inference of prejudice, though weak, has not been overcome. For example, in *Morton*, the government could have sustained this part of its burden by coming forward with credible evidence of problems with the former BIA system among which was the relative absence of Indian personnel in the BIA.

Similarly, if the government cannot also show a credible factual basis for choosing a racial means to pursue this goal, the court should find that the weak inference of prejudice has not been dispelled. The government should be able to discharge this burden with evidence far short of that which would be required to establish that the classification was a "necessary means." Given the relative weakness of the inference of prejudice to which a *Morton*-like preference itself gives rise, the probative value of evidence bearing upon alternative means is dependent on the extent to which such means would have significantly frustrated accomplishing the claimed goal and/or entailed costs or other policy tradeoffs that were not produced by the racial means actually used. To the extent that possible alternative means would have made accomplishing the claimed racially benign goal significantly

less likely or more remote, and/or would have entailed significantly increased costs or unwanted policy effects, these alternatives are not "reasonably available" in any sense that is probative of motivation. With respect to such means, the probable reason that they were not used was goal frustration, increased costs, or unwanted policy effects rather than racial prejudice.

Thus, in *Morton*, for example, the government should have been able to discharge its burden of establishing a factual basis for the racial preference by credible evidence that without exemption from the civil service requirements, Indian representation in the BIA would not have increased significantly during the near future. This proof, together with that establishing the factual basis for the goal and demonstrating the preference's consistent historical context and legislative history, would have provided ample circumstantial evidence supporting the claim that the preference was employed to increase BIA responsiveness to Indians rather than to express anti-white or anti-Indian prejudice.

If the plaintiff believes that other reasonably available and nonracial means can accomplish the benign goal and that the government's failure to use them supports an inference of prejudice, he should be obliged to state what these means are and to produce some evidence supporting their reasonable availability. At this point, the government should be obliged to show that they are not reasonably available. The ease with which the government will be able to discharge this burden depends, not surprisingly, on the degree to which prejudiced motivation is a real possibility. If, for example, the plaintiff claims that the government might have increased compensatory education for Indian students so that later generations would perform more competently on civil service examinations, the government need only point out that this action would obviously delay accomplishing its goal. Presumably, the government would not find it much more difficult to show, for example, that a credible factual basis exists for believing that "alternatives" like simply abolishing the civil service system for all BIA hiring either would not significantly increase Indian representation on the BIA or would entail unwanted effects, or both.

Measured by these standards, most university racially preferential admissions programs would be upheld. With respect to the law schools, for example, the point of racially preferential programs is to make it possible for blacks and members of other minority groups that have been systematically discriminated against

in the past to gain entrance to law school and consequently to the bar. The claimed goals of this racial integration are many, for example: opening legal education and the legal system to formerly excluded viewpoints and subordinated interests; breaking down stereotypic personal attitudes that feed racial prejudice in lawyers and judges; increasing minority group access to positions of power commonly open to lawyers; increasing the supply of minority lawyers for minority clients who may feel greater confidence in members of their own race; helping these racial groups more generally by, for example, providing role models for children and leaders and spokesmen for the groups.

There is little question but that far fewer members of these groups would be admitted to law schools and hence to the bar without preferential treatment. For example, as a result of preferential programs, roughly five percent of law students admitted to the fall, 1976, entering class nationally were black.[93] The best available data suggests that the black admission rate without preferences would at best be forty percent of this, and this is a very optimistic assessment.[94] Nor is there any question, therefore, that blacks, who in 1970 comprised roughly seventeen percent of the population and less than two percent of the membership of the bar,[95] would be severely underrepresented in the bar without preferences.

It seems equally clear that there are no realistic alternative ways of accomplishing the goals of preferences. The most commonly discussed alternative, a general program for the disadvantaged, if administered on the same scale as current racial programs but in a racially neutral way, would result in far fewer minority admissions. Because economically disadvantaged whites would often outrank minority group members on the admission

93. In 1976, 1700 out of a total of 43,000 students admitted to ABA accredited law schools were black. F. Evans, Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall 1976, at 39 (Law School Admission Council 1977), *cited in* Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner at 27-28, Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977) (No. 76-811).

94. The acceptance rates for whites for each LSAT-GPA combination applied to black applicants would reduce the number of black students accepted to no more than 700. Moreover, few, if any, black students would be admitted to the nation's more prestigious law schools, and the 700 figure assumes that blacks could afford to pay private tuitions. *Id.* at 44, *discussed in* Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner at 28, 30, Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977) (No. 76-811).

95. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Detailed Occupation of Employed Persons by Race and Sex: 1970*, in 1970 CENSUS OF POPULATION, DETAILED CHARACTERISTICS, UNITED STATES SUMMARY 1-739 (1973).

criteria, it is very likely that a "disadvantaged" program would have to be at least three times larger (and perhaps eight or nine times larger) than current programs to produce the same minority representation.[96] Other alternatives would fare no better: Simply abandoning the normal admission criteria, for example, would cause a significant decline in the ability of future bar members.[97]

In sum, racially preferential law school programs can be credibly shown to serve important nonprejudiced racial goals and a clear factual basis can be established for the choice of a racial means to pursue these goals. Given this showing, no inference of prejudiced motivation is warranted.[98]

If the terms of a facially benign classification give reason for greater suspicion of prejudice against the apparently benefitted group than did those in *Morton*, or if the plaintiff produces evidence to this effect, the court should scrutinize the classification even more carefully. Perhaps the most troublesome evidence of this character is that suggesting that the classification produces or increases racial separation from whites. Evidence of this sort might appear on the face of an apparently benign classification, as for example a minority restrictive racial "quota"; it may simply be admitted by the government, or the plaintiff might come forward with evidence demonstrating that the classification produces a segregatory effect.

No magical solution exists to cases of this sort. Each must be decided on its facts. In some the action will clearly be either be-

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96. While approximately two-thirds of all disadvantaged families are white, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Money Income and Poverty Status of Families and Persons in the United States: 1975 and 1974 Revisions (Advance Report)*, in CURRENT POPULATION REPORTS, SER. NO. P-60, NO. 103 (1976), current data suggest that 90% of students admitted under such a disadvantaged special admissions program would be non-minority. F. Evans, Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall 1976, at 62 (Law School Admission Council 1977). *Cf.* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 690 (1975) (suggesting that minorities comprise a disproportionate number of disadvantaged persons and thus would benefit from such a program).

97. The normal admission criteria of LSAT scores and undergraduate GPA are accurate predictions of law school performance, *see* 1-2 LAW SCHOOL ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH (1976); Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL EDUC. 293 (1975). No better predictors are known, and their abandonment would thus produce less able law students.

98. On the question whether racial preferences are therefore constitutional, *see* note 1 *supra*.

nignly or prejudicially motivated. Other cases, as for example those involving so-called tipping point quotas in housing that allegedly are designed to promote or maintain integration, probably present among the most difficult problems in racial equal protection law.

A racial quota, ratio, or percentage guideline—all of which are actually the same—is nothing more than a method of giving practical administrative meaning to goals, and the important question here is whether the goals are racially benign or prejudiced. A racial quota, like any other racial classification, should trigger the necessary to a compelling goal rule of evidence only when it is symptomatic of prejudice or singles out a minority racial group for clear disadvantage. Many racial quotas will have neither of these characteristics.

When a quota is used in connection with a racial classification that eliminates or reduces some qualification that had previously substantially limited minority group participation in the program at issue—for example, the Indian employment preference in *Morton*—the government should usually have little difficulty establishing benign motivation. If the challenged classification is otherwise consistent with benign motivation, evidence that the quota produces a movement from little toward racially proportionate minority participation should help significantly in substantiating the claim of benign motivation. In this situation, the quota is being used simply to give practical meaning to the benign goal and can fairly be characterized as integrationist.

A quota is similarly supportive of a benign motivation claim if it results in racially proportionate representation and if no other evidence exists to suggest possible prejudice, as, for example, proof that the quota was adopted to replace some qualification system that had previously relatively advantaged blacks. Insofar as prejudiced motivation is concerned, such a quota is no more probative than is a random selection system. Indeed, as between blacks and whites, random choice is itself a form of quota, given the statistical probability that it will produce a participation rate proportionate to the black-white ratio in the relevant jurisdiction (as in jury selection) or in the applicant pool (as in the distribution of largesse).

The black-white participation rate yielded by random selection or by an explicit proportional representation quota can be characterized as "disadvantaging" blacks, for these devices limit their participation in whichever benefit is being distributed to their proportionate share of the relevant population. However, these devices are not the kinds of "singling out for clear disadvantage"

that trigger the necessary to a compelling goal rule of evidence, because any supposed disadvantage is symmetrically imposed upon whites by virtue of the proportionate limitation on their participation. Absent some other evidence, the only inference about racial motivation that can sensibly be drawn from such a proportionate advantage-disadvantage quota is the perfectly obvious one that it was designed to distribute costs and benefits equally among races, perhaps as a means of assuring nondiscrimination in administration.

For similar reasons, no suspicion of prejudice is warranted by the decision of a local school board (not found to have engaged in prior purposeful segregation) to adopt a racially based student assignment system that demonstrably moves each school in the district toward a black-white ratio closer to that of the district as a whole than does the existing neighborhood residency or other system. So long as the movement is in the direction of racially proportionate representation, the only inference warranted is that the plan was adopted for the benign goal of racial integration.[99]

Racial quotas become potentially much more troublesome in either of two situations: first, when the program in connection with which the quota is used involves assigning people to places or groups and the quota results in concentrations of minority group members that significantly exceed their proportionate share of the relevant population; and second, when the quota either represents a step toward a minority participation rate that is less close to the minority's proportion of the relevant population than that produced by the existing scheme, or, in some circumstances, when the quota simply reduces minority participation. Quotas of the first sort suggest a motive of relative racial segregation; quotas of the second sort indicate a motive to disqualify minority group members at a proportionately greater rate than others.

Whether the government will be able to bear the burden of proving that such quotas were not motivated by racial prejudice depends, in the first instance, on the confidence with which a

99. This is the reason, though not articulated as such, that the Supreme Court could approve voluntary school integration as easily as it did in dicta in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-27 (1971), and why other courts also have approved such programs. *E.g.*, Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm. v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

court can find that the challenged action is either symptomatic of racial prejudice or singles out the racial group for clear disadvantage. To the extent that neither of these characterizations is fair, the government's chance of disproving prejudiced motivation increases. However, as it becomes clearer that these characterizations may be fair, the government's burden of proof should be increased to a point where it at least approximates the necessary to a compelling goal standard.

Consider, for example, last Term's decision in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[100] This case involved a challenge to a New York state redistricting plan, enacted in order to comply with section 5 of the federal Voting Rights Act.[101] Several New York counties became subject to the Act because they used a literacy test during November, 1968, and because fewer than fifty percent of the residents voted in that year's presidential election. New York's first attempt to secure approval of a revised districting plan failed, the Attorney General in 1974 concluding about certain districts in Kings County that the state had not met its burden under the Act "to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color."[102] New York thereafter revised this redistricting plan, in substance increasing the nonwhite majorities in several of the districts at issue so that the smallest nonwhite majority in any district was sixty-five percent. Among the communities affected by these revisions was the Williamsburgh area, where 30,000 Hasidic Jews lived. In order to attain the sixty-five percent nonwhite majority for this area, part of the white population, including a portion of the Hasidic community, was reassigned to an adjoining district.

The plaintiff, as in *Morton*, claimed only anti-white discrimination, although parts of the discussions in some of the opinions are equally relevant to discrimination against nonwhites (blacks and Puerto Ricans) or Jews. Neither the plurality opinion nor the concurrence by Justices Powell and Stewart mentioned the suspect classification doctrine. The plurality upheld the plan on the narrow ground that it did not violate the "non-retrogression" principle previously held constitutional with respect to the Voting Rights Act in *Beer v. United States*[103] and on the broader ground that, though the government had plainly used race in a purposeful manner, "its plan represented no racial slur or stigma

100. 430 U.S. 144 (1977).
101. Voting Rights Act of 1964, § 5, 42 U.S.C. § 1973(c) (1970).
102. 430 U.S. at 150.
103. 425 U.S. 130 (1976).

with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment."[104] Justices Stewart and Powell concurred in the plurality judgment, first asserting in a manner reminiscent of *Morton* that the admitted assignment of voters to districts on the basis of their race was somehow not a racial classification and thereafter finding the plan constitutionally unobjectionable because it was not adopted "with the invidious purpose of discriminating against white voters."[105]

Justice Brennan concurred only in the plurality's narrow ground of decision, noting that if the Supreme Court "were presented with a classification . . . that effectively downgraded minority participation in the franchise, . . . we promptly would characterize the resort to race as 'suspect' and prohibit its use."[106] Under such circumstances, the plan would not necessarily be saved by the fact that its effect was to confer on racial blocs the ability to elect a number of legislators proportionate to its percentage of the population because "the segregation of voters into 'separate but equal' blocs still might have the intent or effect of diluting the voting power of minority voters."[107] For example, a measure purportedly aimed at achieving racially proportionate representation might really be designed to segregate a minority in order to frustrate "its potentially successful efforts at coalition building across racial lines."[108]

Both the complete avoidance by the plurality and Powell-Stewart concurrence of any mention of the suspect classification doctrine and Brennan's observations concerning the doctrine were unjustified. The admittedly racial districting plan should have been (and was) carefully reviewed by the Supreme Court, but because the plan was not symptomatic of prejudice and did not single out a minority racial group for obvious or clear disadvantage, the government should have been permitted to prove its nonprejudiced motivation by evidence other than by that which would qualify under the necessary to a compelling goal rule. This point

104. 430 U.S. at 165.
105. *Id.* at 180 (Stewart, J., concurring).
106. *Id.* at 169-70 (Brennan, J., concurring).
107. *Id.* at 170.
108. *Id.* at 172-73.

seems to be the one that both the plurality and the Powell-Stewart concurrence are making, though in a roundabout fashion.

By comparison, Justice Brennan quite rightly calls attention to a troublesome feature of the case—the segregatory quota—but his opinion misperceives the evidentiary function of the suspect classification doctrine. He appears to believe that finding a classification "suspect" is equivalent to holding it unconstitutional. This mistaken premise led him to believe that if the Supreme Court were to designate a racial classification "benign," it in effect would "exempt" the classification from close review. This view is incorrect, for no safe, reliable way exists by which the Supreme Court can decide whether a classification is benign in advance of the evidentiary scrutiny triggered by the suspect classification doctrine. In other words, the fact that a classification is benign is a finding that can follow only *after* close evidentiary scrutiny; it is not some sort of preliminary determination that serves to exempt the classification from such scrutiny.

Of course, it does not follow that the necessary to a compelling goal standard was the appropriate evidentiary burden to impose on the government. The plan plainly resulted in several districts having significant concentrations of nonwhites relative to the nonwhite population of the county as a whole. However, that which the government moved was not people but rather a boundary line—one the function of which was to allocate political power, not governmental or private sector goods or services. The action did not carry any connotation of separating the races or providing separate facilities or services, and therefore it was not culturally symptomatic of prejudice. Nor, quite obviously, did it result in a clear disadvantage to nonwhites. Whether nonwhite interests are better represented by having minorities in many districts or majorities in a few and minorities in a few is at best an unclear matter of speculation. Such evidence as existed of the plan's effects did not support an inference that it disadvantaged nonwhites in this sense or that it was motivated by prejudice against either nonwhites or whites.

The Voting Rights Act provision relating to localities with literacy tests and low electoral participation plainly and demonstrably addressed a genuine social problem. Because a major part of this problem was the effective disenfranchisement or underrepresentation of nonwhites, whether deliberate or not, using racial criteria in remedying violations is effective in pursuing the goal of fair representation for nonwhites. The probability that anti-white prejudice played a role in the passage of the Voting Rights Act is no greater than in predominately white Congress's

enactment of any legislation. The Attorney General's review resulting in rejection of the first plan and formulation of the second appears rather clearly to have been animated not by prejudice against whites or nonwhites, but rather by concern that the latter be fairly represented. The plan resulted in white majorities in seventy percent of the districts in the county, although the countywide population was only sixty-five percent white—an effect that hardly supports an inference of anti-white prejudice, a violation of the *Reynolds v. Sims*[109] principles, or given the smallness of the disparity and other evidence in the case, an inference of prejudice against nonwhites. Moreover, the plan did not result in nonwhite concentrations so extreme as to suggest either an attempt at blocking minority nonwhite-white coalitions or anti-white prejudice: The sixty-five percent majority nonwhite figure overexaggerated nonwhite voting majorities in that it represented percentages of total rather than voting-age populations, which in some districts were probably only slightly in excess of fifty percent.[110]

The most troublesome feature of the *U.J.O.* case was the possibility, apparently not pleaded by the plaintiff and not seriously addressed by the Supreme Court, that the districting plan was caused by prejudice against the Hasidic Jews. The question was not simply whether *any* plan that resulted in this distribution of white and nonwhite electors was motivated by prejudice against any group, but whether *this* particular plan was so motivated. The county districting authorities obviously were aware of the plan's effect on the Hasidic community. Nevertheless, this awareness alone does not establish prejudiced motivation, and, of course, because of the potential for coalition voting, it is no clearer without further evidence that the Hasidic Jews were "disadvantaged" by the districting than it is that nonwhites would be politically better off spread among many or concentrated in few districts. However, had further evidence been developed by the plaintiff, this feature of the case could have become extremely troublesome. Some suggestion exists that nonwhite majority districts could equally as well have been achieved without impinging upon the interests of any discrete racial or ethnic group other than "whites."[111] Had the plaintiff proved this point and also submitted some credible evi-

109. 377 U.S. 533 (1964).
110. 430 U.S. at 164.
111. *Id.* at 181-82 (Burger, C.J., dissenting).

dence suggesting that at least as to Hasidic Jews interests were less well protected by the split than by concentration, the inference might have been warranted that this particular plan was causally affected by prejudice against them. That this inference might have been warranted will become clearer when we consider covert discrimination.

In regard to the issue of prejudice against blacks or nonwhites, some kinds of quotas can be considerably more problematic than that challenged in *U.J.O.* Determining whether a so-called tipping point housing quota was motivated by such prejudice could be extremely difficult. Such a quota can result in the denial of housing to blacks in order to prevent an apartment complex (or perhaps neighborhood?) from reaching a supposed "tipping point" and eventually becoming all black.[112] Although complete discussion of this complicated problem is beyond this article's scope, a few points can be noted here.[113]

All other things being equal, tipping point and related kinds of racial quotas become more probative of prejudice as the discrepancy increases between the quota percentage of blacks (or other racial groups) and their percentage in the applicant pool. Of course, if no discrepancy exists, the quota meets the random choice or proportionate representation model and can fairly be characterized as integrationist and unobjectionable, for it imposes advantages and disadvantages in equal measure on affected racial groups. As the discrepancy increases, the quota becomes more problematic because the discrepancy is a potential measure of both segregation and disadvantage.

If, on the one hand, blacks comprise ten percent of the applicant pool and eighty percent in the quota, the program has symptoms of racially prejudiced segregation. If, on the other hand, blacks comprise eighty percent of the applicant pool and ten percent in the quota, the program seems both to single out and to segregate blacks to their clear disadvantage. Discrepancies of this magnitude are functionally very close to the kinds of racial classifications that have triggered the necessary to a compelling goal rule of evidence and should probably be struck down unless the

112. *E.g.*, Otero v. New York City Hous. Auth., 344 F. Supp. 737 (S.D.N.Y. 1972) (preliminary injunction issued), 354 F. Supp. 941 (S.D.N.Y.) (order), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

113. For an interesting discussion of both the empirical constitutional issues involved in housing quotas *see* Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974). The most perceptive treatment of this general problem area is Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

government establishes by clear and convincing evidence (or some similar minimal standard) that prejudice played no role in the program's promulgation. As the discrepancy narrows, its probative value on prejudice diminishes, though it should nevertheless be carefully reviewed, with the government bearing the burden of proof. If, for example, blacks comprise sixty percent of the applicant pool and fifty percent in the quota, factual substantiation by the government of the reality of the tipping point projection, combined perhaps with evidence of relevant behavior by the housing authority incompatible with prejudice and a reliable administrative record showing notice to and participation by affected groups and consistent with an integration goal, should probably suffice to disprove prejudice.

One final indicium of prejudice against a group apparently benefitted by a facially benign racial classification deserves special note. In the terms of the classification itself, perhaps the most suspicious item of evidence that might appear would be a mandatory requirement that all members of the apparently benefitted racial group participate in or take advantage of the preferential system. Imagine, for example, that taking advantage of the exemption from competitive civil service requirements was made a condition of BIA employment of Indians, so that Indians were not permitted to compete with others for jobs even if they wished. A "preference" of this sort seems gratuitously demeaning, in that the foreclosure of individual choice borders on a racially paternalistic lack of respect for group members as competent choice-makers. For this reason, such a mandatorily segregated applicant pool gives rise to a considerably stronger inference of prejudiced motivation than does a *Morton*-type preference. When, as here, something about the terms of the facially benign classification leads to a heightened suspicion of prejudice against any group, the government should be required to prove by clear and convincing evidence that these terms were not motivated by prejudice.

In this regard we should emphasize that a mandatory racial classification, even if apparently benign, should rarely, if ever, be sustained on the basis that its goal is protecting members of the singled-out racial group from themselves. For example, a government explanation of a hypothetical mandatory BIA civil service exemption in *Morton* as designed to protect Indians from "wasting their own time" or "feeling disappointed" when the vast ma-

jority of them fail the exam should be regarded as a concession that the suspicious terms were motivated by racial prejudice. This form of racial paternalism is part and parcel of the ideology of racial prejudice, and for this reason it merits unequivocal condemnation.

Although the point seems obvious, it is worth noting expressly that because racial paternalism is a prejudiced goal, a racial classification that is facially presumptively prejudiced cannot be transformed into a "benign" classification by the sheer manipulation of words. Thus, a so-called "efficient" racial classification, say a government ban on the employment of blacks in certain private occupations or government positions, singles out a minority racial group for clear disadvantage and under the motive theory proposed here is therefore presumptively prejudiced.[114] Such a classification should be held unconstitutional unless the strong presumption of prejudice is dispelled by proof that the classification was necessary to a compelling goal. Evidence that members of the disfavored group were significantly less likely than others to perform well on the job would not satisfy this proof standard because it would not be persuasive enough to dispel the experientially rooted presumption of prejudice. Racial stereotyping is only a symptom of the underlying attitude of racial disrespect or dislike, and the fact that statistical evidence shows that the stereotype has some factual basis does not and cannot alone establish with sufficient reliability that it was the factual basis rather than the attitude of dislike or disrespect that prompted the governmental action. Nor can the government escape this analysis by claiming that the hypothetical employment ban is a "benign" classification because motivated by the goal of protecting blacks against job disappointments or giving them "realistic" career aspirations. Such a claim is at best a concession of paternalistically racist motivation.

If a racially paternalistic goal is ever to be considered nonprejudiced—and the proposition is by no means clear that it ever should—its acceptance should be limited to situations in which both the racial classification itself can be shown to have been enacted in pursuit of nonprejudiced goals and the mandatory paternalistic feature of it concerns a subject about which paternalism is widely regarded as morally proper irrespective of race. An example of such a situation is a program of mandatory physical ex-

114. It is for this reason that "efficient" racial classifications are very different from benign classifications, contrary to Professor Posner's assumption. *See* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

aminations established for members of a particular race in an effort to detect a serious, though noncommunicable, racially linked disease like sickle-cell anemia; however, because the possibility of paternalistically racist motivation is present even here, the government should bear the burden of proving through reliable evidence that a voluntary program would be inadequate.[115]

Evidentiary Inferences and the Concept of Institutional Motivation

Having supplied some concrete illustrations of the racially prejudiced motivation theory in operation in cases involving racially overt actions, we can now return to the logically prior question of whether one can meaningfully talk about an institution's motivation and, if so, the extent to which its motivation is evidentially ascertainable. Asking a question about a group's motives for taking an action is neither more nor less meaningful than is asking about an individual's motives. We commonly rely most heavily on the same kind of evidence in determining individual and group motives—circumstantial evidence from which we infer which of two or more motives was the more probable. Drawing inferences from circumstantial evidence about the motivation of either individuals or groups is not always an easy task intellectually, and when the evidence supports equally an inference of either innocent or illicit motivation, the crucial issue is who has the burden of proof, for the other party is entitled to the benefit of doubt.

The kind of evidence that is most readily available and often used in adjudicating whether an institution's action was racially prejudiced is evidence of the behavior of the institution whose members took the action the plaintiff is challenging. Such evidence supports an inference of the institutional motivation of a multi-membered group to the same extent it would individual motivation if the government authority at issue consisted of a single person, like a commissioner. We shall call circumstantial proof of this type *evidence of specific institutional behavior*. Two other kinds of evidence might be more problematic—generic institutional behavior and individual member motivation. The first does not appear to concern the courts but deserves at least brief comment, for it is a kind of evidence that, strictly speaking, is not

115. *See* notes 130-31 and accompanying text *infra*.

available in connection with individual, non-institutional motivation. Rather it is available in connection with institutions, for they have generic identitites (or legal existences) that at any point in time temporally transcend their specific membership. The second kind of evidence has been of considerable concern to the courts, basically because the statements of a member of an institution are often very probative evidence of his own motivation but less probative of that of a multi-membered institution.[116]

The first evidentiary category consists of evidence of specific institutional behavior from which a circumstantial inference of institutional motivation may be drawn. It includes, most prominently: (1) overtly racial rules or regulations that may (a) be symptomatic of prejudice, (b) single out a minority racial group or groups for clear disadvantage, or (c) have neither of these racial characteristics, or share one or the other to some incomplete extent;[117] (2) evidence that the action significantly disadvantages a member or members of a minority racial group relative to others within the relevant population;[118](3) an explantion of the purportedly innocent goals of the challenged action that is sufficiently contextually peculiar to warrant disbelief;[119] (4) evidence that the action's purportedly innocent goals could have been accomplished by reasonably available alternative means with a significantly less racially disproportionate effect;[120] (5) judicial or administrative decisions that assign race as one of the grounds of decision; (6) an institutional admission, as for example a preamble of legislation racially neutral on its face that recites a racial purpose or an admission by counsel representing the institution that took the challenged action;[121] (7) evidence of a contextual peculiarity in the process that led to the challenged actions, as, for example, the omission of a required or customary hearing;[122] (8) evidence that the specific membership institution has previously been found to have engaged in racially prejudiced actions;[123] (9) evidence of a social-political background or context

116. *See* notes 132-40 and accompanying text *infra*.

117. *See* notes 48-115 and accompanying text *supra*.

118. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976).

119. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960), *discussed in* text accompanying note 161 *infra*; Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

120. *E.g.*, United States v. School Dist., 521 F.2d 530, 538 n.13, 540 n.20, 542-43 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975). *See* notes 166-74 and accompanying text *infra*.

121. *E.g.*, Hawkins v. North C. State Bd. of Educ., 11 RACE REL. L. REP. 745 (W.D.N.C. Mar. 31, 1966). *Cf.* Truax v. Raich, 239 U.S. 33 (1915) (discrimination against aliens apparent on face of legislation).

122. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

123. The courts do not seem to distinguish cases on the basis of whether the

suggestive of racial prejudice;[124] (10) evidence of the data and arguments, whether by outsiders or members, presented to the institution during the information-gathering and deliberative processes that led to the action.[125]

To repeat, these evidentiary items of specific institutional behavior have the common characteristic that their probative value on the question of racially prejudiced motivation is *not* affected by the fact that the action was taken by a group rather than by an individual.[126] A significant difference also exists among evidentiary items in this category—one that we shall see has important implications for the process of proving the causation issue: Items (3) and (4) when offered in conjunction with item (1) or (2) function to create inferences that discredit claims that the action was motivated by racially innocent considerations, while items (5) through (10) create inferences that racial prejudice was *among* the factors motivating the decision.[127]

We have already considered several kinds of racially overt rules and regulations.[128] Given our discussion of the reasons that some racially overt rules create strong inferences of racially prejudiced action and others do not, the fact should be obvious that whether the classification was promulgated by a single- or multi-member authority is simply irrelevant. Perhaps less obviously, the same is true of governmental actions other than racially overt rules so long as the evidence of motivation is confined to items (2) through (10).

This point can be illustrated by recalling our earlier hypothetical involving a zoning board decision denying a variance for a low-income housing project.[129] There we made the unrealistic as-

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prior official action was taken by the same or by different members. In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), 21 different individuals had served on the seven-member school board during the period at issue. *See* Case Comment, Keyes v. School District No. 1: *Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L. L. REV. 124, 140-41 (1974). *See generally* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976). *See* notes 130-31 & 167-72 and accompanying text *infra*.

124. *E.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Griffin v. County School Bd., 377 U.S. 218 (1964).

125. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

126. Professor Brest also makes this point. *An Approach, supra* note 3, at 119-23.

127. *See* text accompanying notes 178-79 *infra*.

128. *See* notes 48-115 and accompanying text *supra*.

129. In many states, a variance would not be available for a significant zoning

sumption that the board's motives were fully known: The court knew that the board acted because it wanted to exclude the black population that the project was predicted to attract. It also knew that the board would have denied a variance to any use of property other than for single-family dwellings even apart from the race of those affected. Let us now eliminate this artificial assumption of knowledge and consider the evidence on the basis of which a real lawsuit might be adjudicated.

Assume that a plaintiff developer proves that it requested the variance and that the request was denied, that blacks comprise twenty percent of the population of the metropolitan area in which the town at issue is located but only two percent of the town itself, and that of those in the metropolitan area who would have been eligible for the low-income project, fifty percent are black. This evidence alone, as we shall discuss later, does not warrant the inference that the variance denial was racially prejudiced. If, in an attempt to present additional evidence warranting this inference, the plaintiff offers any of the kinds of evidence included in the first category (or the court on its own concludes that the government's innocent explanation is incredible), the evidence will be equally probative (or nonprobative) of motivation whether we assume that the zoning authority was a multi-member board or a single commissioner.

Suppose, for example, that the reason given for the denial and the one argued in court is that the project would be inconsistent with the neighborhood's essentially single-family character, that the plaintiff proves that twenty percent of the families in the area live in apartments, and that this percentage has increased markedly during the past three years because the same members of the zoning authority granted four successive variances for commercial apartment complexes of the same general size as the proposed project. This evidence may be inconclusive on the motivation issue, but its inconclusivity is not a function of whether the authority is single- or multi-membered.

The difficulty is that the evidence, given the assigned and argued reason for the authority's decision, is not necessarily inconsistent with a goal of preserving the neighborhood's "essentially" single-family character—that is, the evidence does not realistically exclude the possibility that the authority decided that a

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exception of this sort. *See, e.g.*, Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974). The jurisdiction might be able to provide for such exception by adopting a conditional use permit type of ordinance, typically entailing greater procedural checks and more extensive consideration.

maximum population of twenty percent apartment dwellers would not alter the neighborhood's essential character but that greater percentages would. The probability that this *was* the authority's real reason for denial does not, however, depend on whether the decision was made by a single- or multi-member board. If by a single-member board, the real reason for decision was possibly the innocent one claimed, or the exclusion of blacks, or both. If by a multi-member board, any of these three might be the real reason that *each member* voted to deny the variance. The question of how to resolve the circumstantial inference raised by the evidence is the same whatever the numerical membership of the board: How likely is it that a zoning board member would have denied the variance in order to preserve the neighborhood's essential character, irrespective of racial prejudice? If a court determined that this explanation of a board member's behavior was not at all likely, it would find the *board*'s decision unconstitutional; if, as is more probable, the court believed that a zoning commission would as likely as not act in this racially innocent way, it would find the *board*'s decisions constitutionally permissible. The same would be true if we constructed the hypothetical so as to increase the likelihood that the authority acted—and that a court would find that it acted—out of racial prejudice. The authority's numerical composition would be equally irrelevant, for example, if the plaintiff, confronted with the same defense we assumed above, were able to prove that ninety percent of the families in the neighborhood lived in apartments for which a succession of variances had been granted, *or* that while only twenty percent lived in such apartments at the time of denial, the same membership board, during the six months following the denial, granted five more variances for commercial apartments, raising the projected total to fifty percent.

Whether the authority was single- or multi-member is irrelevant on the evidence because in the case no direct proof was offered of anyone's state of mind. Instead, the evidence went entirely to specific institutional behavior, and no reason exists to suppose that its probative value differs among different members of a zoning board. The inferences that the plaintiff is asking the court to draw from this evidence are: (1) that a reasonable person (or zoning commissioner) would not have taken the action for the alleged innocent reason; and (2) that because (a) no other innocent reason has been suggested, (b) the action produces an effect

that significantly harms blacks relative to whites, and (c) it is common knowledge that whites often act out of racial prejudice against blacks, the decision of each member who voted for the denial was more probably than not caused by racial prejudice.

The institution's numerical composition remains irrelevant so long as any supplemental proof consists of evidence relevant to the behavior of the specific membership that took the challenged action. Suppose, for example, that the board gave as reasons for the denial both the single-family character of the neighborhood *and* a desire to keep blacks out. The reasons assigned by the board for its action are evidence of its institutional motivation, equally probative whether it has one or one hundred members. Or assume instead that the plaintiff is able to supplement any of the three previously mentioned proof scenarios concerning the plausibility of the single-family dwelling explanation with evidence that several groups held newspaper-covered demonstrations to protest opening the community to blacks, that several opponents of the variance testified to this effect at the hearing, and that the zoning authority neglected to request a staff report on the merits of the variance as it always had done on other variance matters. The inferences that the plaintiff seeks to have the court draw from such evidence are that a reasonable person would probably be swayed to some extent by community excitement and testimony and would probably not fail to follow a customary procedure unless he were afraid of what following that procedure would reveal or unless he had already decided the issue. If these inferences are at all warranted, and they certainly seem to be, they are equally warranted as to all the board members who voted against the variance.

Suppose, however, that plaintiff proposes to introduce evidence that the city's "generic" zoning board, over a ten-year period during which time the membership changed substantially, has on two occasions been judicially determined to have engaged in racially prejudiced zoning practices. Or consider evidence offered by a black recently denied a business license that the generic institution during a ten-year period has engaged in anti-black licensing practices explainable on no plausible ground other than racial prejudice. Or consider evidence offered to discredit a claimed racially innocent reason (like tardiness) for a public institution's having terminated the employment of a black, offered to prove that over a ten-year period the generic institution has not fired whites who were similarly tardy.

These are examples of behavioral evidence relevant to the generic institution the current membership of which took the chal-

lenged action and the institutional motivation of which is now at issue. The courts appear to receive and often rely heavily upon such evidence, regardless of the fact that the individuals who now comprise the challenged institution may be different from those who took the action offered in evidence.[130]

Evidence of this sort is related to that of contemporaneous social-political conditions that may shed light on the motivation with which a specific membership institution acted. Its relevance and probative value rest on the fact that institutions usually reflect and respond to the socially and politically dominant values in the community that they serve, and indeed, these values will often be effectively institutionalized in the unchanging bureaucracy that often comprises the institution's staff. A change in institutional membership might, of course, herald a change in goals and policies; but when a newly chosen membership engages in actions that bear some hallmarks of racial prejudice, the fact that the generic institution has historically engaged in similar practices is relevant and probative of the new membership's motivation because we know that institutions can rarely escape the tug of basic community, constituent, and bureaucratic forces.[131]

The final kind of evidence that is sometimes available to prove institutional motivation is evidence of individual member motivation, as if, for instance, one of the five members of our zoning board who voted to deny the variance said at the time that he acted to keep blacks out of the community. Evidence of this sort has been of significant concern to the courts. For example, in *Washington v. Davis*,[132] the Supreme Court presumably meant to call attention to this problem in its "explanation" of its earlier decision in *Palmer v. Thompson*.[133] *Palmer* involved a challenge to a Jackson, Mississippi, city council decision to close the city's public swimming pools rather than to desegregate them as required by a court order. *Palmer* was decided several years after *Griffin*

130. *See* note 123 *supra*.
131. The difficult question is how a court can distinguish bona fide new and racially neutral policy choices the effects of which happen to resemble those of previous racially prejudiced actions. Sometimes the issue can be determined with confidence through circumstantial inferences, and in closer cases the important questions concern the allocation and level of burdens of proof, as we shall discuss later. *See* notes 175-79 and accompanying text *infra*.
132. 426 U.S. 229 (1976).
133. 403 U.S. 217 (1971).

v. County School Board,[134] in which the Supreme Court, upon finding it illicitly motivated, had invalidated that county's decision to close its public schools rather than desegregate them. The *Palmer* Court nonetheless refused even to entertain the argument that the Jackson swimming pool closure was unconstitutional because taken for racially impermissible motives.[135] The *Washington* Court explained *Palmer* in this fashion: "The holding of the case was that the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations."[136] While this explanation seems as opaque as the *Palmer* opinion itself, apparently the Court meant to call attention to the difference between evidence of the motivation of an institution on the one hand and that of the individual members of the institution on the other.

The confusion in both the *Palmer* decision itself and in *Washington*'s explanation of it is probably caused in some measure by the Court's failure to distinguish between two related but different evidentiary questions and perhaps by an additional failure (whose consideration is beyond this article's scope) to distinguish both these questions from that of the appropriate remedy after a violation is proven.[137] One evidentiary question concerns the *admissibility* of different types of evidence of institutional motivation. A second question concerns the *probative value* of

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134. 377 U.S. 218 (1964).

135. 403 U.S. at 224.

136. 426 U.S. at 243.

137. If a plaintiff proves that the provision of some public service has been terminated or otherwise warped because of racial prejudice, and the government defends, as in *Palmer*, essentially on the ground that the existence of private racial prejudice would make continued or nonwarped provision of the service both extremely cost-ineffective and integration-defeating, it seems both plausible and at least prima facie sensible to suppose that a court might properly consider these cost considerations when framing a remedy. Thus, for example, it may be that reliable evidence might have been marshalled in *Palmer* to prove both that the continued operation of only some of the previously available swimming pools would have resulted in no significant decrease in swimming opportunities available to blacks and that white attendance at swimming pools would drop to near zero after they were integrated. If a court were persuaded that there was a substantial factual basis for these projections, it would seem arguable that the appropriate remedy would allow the city to close half (but only half) of the pools. The same type of considerations seem involved in a wide variety of remedy issues, as, for example, in the "white flight" projections sometimes made in connection with school desegregation decrees. Determining what constitutes a reliable factual basis and precisely how the projections should affect the remedy is obviously not easy; but common sense suggests that if a reliable factual basis for projecting white flight can be established, a court ought not simply ignore the data when framing a remedy. I should emphasize, though, that I have not fully thought through the implications of this view on remedy, and I have not attempted to grapple with the facts of real cases to test its workability.

different types of evidence. Both the *Palmer* decision and *Washington*'s explanation of it create what is probably the mistaken impression that evidence of the motivation of individual members is broadly inadmissible to prove institutional motivation, rather than, as is undoubtedly true, that such evidence may *sometimes* be beyond the plaintiff's power to produce because government officers may be privileged not to testify. Moreover, when it is available, such evidence will usually have relatively little probative value on the issue of institutional motivation.

The question of whether and to what extent members of government bodies should be privileged to refuse to testify about their reasons for having approved or disapproved an official action is an important one, though also beyond this article's scope.[138] Rather clear signs appear in recent Supreme Court opinions that this previously sacrosanct territory may soon be at least partially desanctified.[139] Perhaps the central issue is defining the circumstances in which the power to call and cross-examine government officials is likely to be sufficiently helpful to plaintiffs to warrant overriding the rather obvious policies supporting the testimonial privilege. Although some situations probably exist in which cross-examination of individuals would significantly benefit plaintiffs, there are many others in which the benefit would be marginal. Most officials called to the stand would deny that racial prejudice played a role in their decisions and would explain their votes as based on some racially innocent goal. The critical question would be whether the official is telling the truth, and this question presents exactly the same inference issue that would arise if the official did not testify but if instead counsel representing the government claimed that the same innocent goal explained the institution's actions. Thus, assessing the credibility of testimony by a member of our hypothetical zoning board that she voted to deny the variance because of the neighborhood's single-family dwelling character presents the court with exactly the

138. I am not aware of any recent systematic discussions of this question. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); 8 J. WIGMORE, EVIDENCE §§ 2369-2372 (3d ed. 1940). *Cf.* United States v. Nixon, 418 U.S. 683, 705 (1974) (discussing presidential immunity from judicial process); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (holding that inquiry into mental processes of decisionmakers is usually to be avoided); Tenney v. Brandhove, 341 U.S. 367 (1951) (discussing legislators' privilege to be free from arrest or civil process for speech or acts during legislative proceedings).

139. *E.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

same circumstantial inference issue as if she had never taken the stand. The additional evidence generated, for example, by watching the official "back and fill" during cross-examination is probably of some incremental evidentiary value, but it is not clear whether in the common run of cases this value warrants overriding the privilege and adding to the time and expense of trials.

The important point for our purposes is that the answer to the question of whether the privilege should be available and, if so, under which circumstances, should depend on the foregoing calculus, not on any mysticisms concerning the difference between institutional and individual motivation. An institution consists of its individual members; if no privilege is available and if a majority of those who voted for an action reveal, through either devastating cross-examination or credible direct admissions, that they would not have voted as they did but for racial prejudice, the institution's actions should be held unconstitutional. To be sure, if the privilege were eliminated, significant problems would arise in determining how many individual members must be shown to have acted with bad motives, whether a showing of illicit motives on the part of key members like committee chairpeople suffices, and so forth. These problems, although difficult, are probably not beyond solution, and it is worth repeating for emphasis that the spectre of a plaintiff calling fifty member-witnesses is probably based on an overestimate of the incremental probative value of such evidence.

The testimonial privilege of government officials is by no means the only problem that can arise in connection with evidence of individual member motivation. Either a plaintiff or the government may seek to introduce various kinds of out-of-court statements by members, and presumably both sides have substantial if not complete latitude in offering in-court testimony by willing members.[140] It is difficult, if not impossible, to believe that *Washington*'s explanation of *Palmer* intended to make such evidence broadly inadmissible, although it is true that such evidence—except in the case of single-member institutions—will usually have relatively little probative force.

If a member's out-of-court admission that prejudice affected his own decision were made in circumstances suggesting that it might have affected the motives of other members of the institution, it would be to some extent probative of institutional motivation, though *not* because made by a member. If, for example, on the day and near the place that the vote was to be taken, the

140. *See* note 138 *supra*.

member made a public speech at a mass rally expressing his support of the pending action because it would keep blacks out, or if he made an argument to like effect during the institution's deliberations, the statements would be circumstantial evidence of specific institutional behavior and relevant to the question whether prejudice played a role in the decision. The first statement is evidence of the social-political context, and the second, of information or arguments provided to the institution. Had the public speech been given under the specified circumstances by someone who was not a member of the institution and the prejudiced argument made by a non-member witness testifying before a committee, these items of evidence would obviously be probative of the influences that might have prompted the institution to act. Neither becomes any less probative because made by a member. Even statements of this candid kind, whether made by members or non-members, will usually be of relatively little probative value, as we shall discuss at greater length in connection with proving causation; but such evidence is both admissible and relevant, sometimes quite probative, and in any event in close cases could tip the scales.

Admissions by individual members not made in these kinds of circumstances are relevant to institutional motivation only because the individual is a part of the institution and his admission of personal prejudice therefore tells us something about his role in the institution's action. However, such statements, as for example an out-of-court admission to a third party or willing trial testimony admitting personal prejudice, have little independent probative value concerning institutional motivation, for one member's motivation, standing alone, provides no information about others' motives.

Covert Discrimination: Racially Disproportionate Effects in Conjunction with Circumstantial Disproof of Innocent Goals

In cases in which the governmental action that the plaintiff attacks as racially discriminatory is not a racially overt rule, the courts do not invoke the necessary to a compelling goal rule of evidence, and they do not employ the vocabulary of "suspiciousness." That which distinguishes overt from covert discrimination cases is the probative value on the prejudiced motivation issue of these different kinds of governmental actions. The terms of some

racially overt rules often go far toward establishing that the action is racist or at least that it relatively disadvantages races against which prejudice exists. A racially overt rule is also conclusive evidence that racial considerations affected the decision process, and the very fact that the rule is articulated in racial terms is a substantial indication that it would not have been enacted but for these racial considerations. For these and for the other evidentiary reasons that we have discussed, even a facially benign classification should be regarded suspiciously. Other kinds of governmental actions—for example, enacting racially neutral rules or making discretionary administrative determinations that do not refer to race—usually share none of these evidentiary characteristics. For all that actions like these bespeak, racial considerations probably played no role in them, and even if they did, the same actions might well have been taken apart from these considerations.

For these evidentiary reasons, racially neutral rules or governmental actions are not themselves suspect. However, if the plaintiff pleads and offers evidence sufficient to warrant an inference of prejudiced motivation, the challenged rule or action should be regarded suspiciously and thus carefully reviewed. Whether a challenged action should be regarded as suspicious, and if so, how suspicious, depends on the type of action and the probative force of the plaintiff's evidence suggesting racial prejudice. Minimally, in any case in which the plaintiff has come forward with credible evidence supporting an inference of racially prejudiced motivation, the court should demand of the government a more credible, nonprejudiced explanation than would be required under the classic version of the rational basis test applicable in run-of-the-mill equal protection cases, though considerably less than would be required under the necessary to a compelling goal test. In some circumstances an intermediate burden of proof should be shifted to the government.

Perhaps the single most noteworthy item of evidence supporting an inference of prejudice is proof that the challenged action produces a significant effect of proportionately disadvantaging a racial or ethnic minority group relative to others. When the proportionate disadvantage is instead suffered by the majority white group, an inference of anti-white prejudice will ordinarily not be warranted without very substantial additional evidence, given the improbability of this group's taking prejudiced actions against itself.[141] In other words, the government should usually have little difficulty proving that a measure that disproportionately disad-

141. *See* note 87 and accompanying text *supra*.

vantages whites was taken either for non-racial or for racially benign goals.

When, however, the plaintiff proves that the relative disadvantage is suffered by a racial or ethnic minority group, this evidence alone gives rise to an inference of possible prejudiced motivation sufficient to warrant careful judicial review and to require the government to come forward with a credible, nonprejudiced explanation of the action. Evidence of disproportionate impact alone, therefore, should be enough to support a finding of prejudiced motivation only in the rare case in which the government simply declines to offer any explanation of the motivation behind the challenged action.[142] However, such evidence, when combined with evidence that circumstantially disproves any innocent goals that the government claims the challenged action pursues, is sufficient to warrant a finding that the action would not have been taken but for prejudiced motivation.

Sometimes this circumstantial disproof might be supplied by the government itself, as when it offers an explanation that simply is not credible. Cases involving incredible government explanations include those that have sometimes prompted claims that the governmental action is "irrational." In other cases the government's innocent explanation may be sufficiently credible to warrant the inference that prejudice did not cause the action, and here the burden of discrediting the government's claim falls upon the plaintiff, except perhaps as to certain kinds of governmental actions with respect to which a persuasive argument might be made for shifting the burden of proving circumstantial corroboration to the government.

The principal case dealing with disproportionate effects is *Washington v. Davis*.[143] In this case plaintiffs challenged the Washington, D.C., police force's use of a civil service examination testing verbal ability, vocabulary, reading, and comprehension. Applicants had to pass the test, which was standard for government employment, in order to qualify for a training program that was a prerequisite to becoming a police officer. Plaintiffs proved that blacks failed the examination at a rate four times greater than did whites. On the basis of this racially disproportionate ef-

142. On the question whether disproportionate impact alone should trigger heightened judicial scrutiny, *see* note 1 *supra*.
143. 426 U.S. 229 (1976).

fect, plaintiffs claimed that the test was unconstitutional unless the government proved that it predicted successful job performance. Plaintiffs made "no claim of 'an intentional discrimination or purposeful discriminatory acts.' "[144]

The Supreme Court rejected plaintiffs' attack, characterizing plaintiffs as arguing that governmental actions that are not racially overt but that produce racially disproportionate effects are unconstitutional "absent a compelling justification." The Court found such a claim unacceptable, because it "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes."[145]

Clearly the Court properly rejected the claim it described. Less clear is that the theory it rejected was the one the plaintiff was proposing.[146] The sole fact that a governmental action produces racially disproportionate effects is not adequately probative of racially prejudiced motivation so as to justify triggering the necessary to a compelling goal test, for experience suggests there will often be truthful, nonprejudiced explanations of the action that would fall short of satisfying the compelling justification standard.[147] The question in such cases is whether any of these explanations is sufficiently persuasive to offset the inference of prejudiced motivation that would otherwise arise from the disproportionate effect. The answer to this question will obviously depend upon the precise facts of the case: In which ways and to what extent is the impact racially disproportionate, and, given the type of governmental action at issue, how persuasive is the government's explanation?

Throughout much of its opinion in *Washington* and again in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[148] the Supreme Court appears to have understood all these points very well. However, the *Washington* opinion does contain some rather confusing passages. Several create, if somewhat vaguely, the impression that a law or test that produces a disproportionate racial impact but that is neutral on its face is constitu-

144. *Id.* at 235.
145. *Id.* at 248.
146. For three thoughtful and provocative arguments on behalf of constitutional approaches that sometimes would invalidate government actions on the basis of racially disproportionate effects without regard to motivation, *see* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). *See* note 1 *supra*.
147. *But see* note 1 *supra*.
148. 429 U.S. 252 (1977).

tional so long as it has some rational basis.[149]

If these passages were meant to reflect anything more than the fact that the plaintiff had not pleaded that the test was a product of racially prejudiced motivation, they are most unfortunate. A plaintiff whose pleading is sufficient and who proves that the action he challenges produces a significant racially disproportionate effect should certainly not have his complaint dismissed simply upon a finding that the challenged action satisfies the traditional rational basis test, under which an action is "rational" if it has "any conceivable basis in fact."[150] The reason is that a showing of significant disproportionate disadvantage to a racial minority group, *without more*, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged. This showing alone does *not* establish that a goal of the action was to disadvantage these groups or that racial prejudice otherwise affected the decision process, but it raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken quite apart from prejudice. Depending upon the type of governmental action at issue, discharging this burden will often be easy for the government, but sometimes it will be difficult or impossible. In all cases, however, the government should be required to show more than that the action has some racially innocent "conceivable basis in fact" because, as anyone familiar with this standard is aware, it can result in the validation of actions on the basis of explanations that are virtually incredible.[151]

Perhaps another way of making this point is to say that it is highly unrealistic to suppose that government entities are unaware of the probable racial consequences of a great many actions that they take, particularly of those that are realistic objects of equal protection attacks. Sometimes this awareness is a result of

149. 426 U.S. at 229, 241, 244, 246-47.

150. *E.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). Some of the more interesting discussions of "rationality" analysis in constitutional law are: Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); *Motivation*, note 1 *supra*; Sandelow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

151. *E.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949). *See* note 150 *supra*.

personal knowledge, as in the case of school board members who are usually well aware of their districts' racial demography and can hardly claim they did not know the racial consequences of locating a school at a particular place or drawing attendance area lines in a particular fashion. At other times the awareness is a result of by now widely disseminated social science information correlating race with other characteristics. Any professional and probably most newspaper readers know, for example, that a higher proportion of blacks than whites will score at the low end of certain kinds of "intelligence" tests and will have low incomes and that therefore actions that relatively disadvantage low test scorers or those with low income will disproportionately disadvantage blacks relative to whites. Even a government entity that was unaware of the racial consequences of an action at the time it was taken will often later learn of its racial effects because either interested groups or a plaintiff in a lawsuit will make these facts known. Furthermore, subject to some important, if unprincipled, exceptions that derive from state action values or related remedial limitations on the judicial role (that apply in some but far from all cases), the government's maintenance of or refusal to modify a law or course of action for racially prejudiced reasons should be held to violate the process distortion and dignitary harm norms.[152]

This conclusion by no means establishes that actions should or would be held unconstitutional simply because they produce racially disproportionate effects.[153] Indeed, in the vast majority of cases, evidence of such effects alone should not lead to a finding of unconstitutionality. Moreover, even in cases in which, on the basis of evidence of effects alone or effects in conjunction with other evidence, an action is held unconstitutional, nothing ineluctably follows concerning the appropriate remedy.[154] The point is simply that for the law to blind itself to social reality would be foolish, and the reality is that government entities are usually aware of the racial effects of actions that they take. Given this reality and our national history of racial prejudice, to dispel an inference of prejudiced motivation arising from significant racially disproportionate impact, the government's racially innocent explanation should *and probably does have* to be more credible than would be required under the any conceivable basis in fact standard.

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152. *See* note 34 *supra*.

153. Compare this outcome with those that would be produced by the three theories in the articles cited in note 146 *supra*.

154. *See* note 137 and accompanying text *supra*.

The traditional rational basis test is largely a sham as an independent standard of constitutional review or as a prerequisite to establishing the constitutionality of state action.[155] To the extent that the rational basis test has served any significant function in constitutional law, it has been as an evidentiary device for flushing out constitutionally impermissible motives or goals. Viewed as an independent norm, the test is largely an illusion. Of its own force the rational basis test invalidates no motives or goals. If, for example, the government defends a segregation requirement as designed to serve the goal of subordinating blacks, the measure would be unconstitutional not because it lacks a rational basis but rather because the goal is impermissible. The rational basis test purports to regulate only the relationship between goals and means, such that a law or action the goal of which is to produce effect *A* is theoretically invalid if "in fact" it produces effect *Not A*.

In theory, this requirement implements an understandable norm—namely, prohibiting the government from making "clear mistakes" in the selection of means for accomplishing goals. However, there are two related practical problems with enforcing this norm. The first is that the question whether a legislative or an administrative body made a "clear mistake" inevitably turns upon the standard for judicial review of these other branches' determinations of often fairly complex issues of social fact. Even assuming that the "goal" is known, whether a legislative or administrative body made a "mistake" in its choice of means for accomplishing that goal will usually be a matter of judgment. Suffice it to say, without an attempted argument, that the courts have traditionally and rightly been quite deferential[156]—hence the "any conceivable basis in fact" standard.

The second problem is that the theoretical statement of the norm overlooks the epistemological or evidentiary interdependencies between effects and goals. An action's effect is usually very probative evidence of its goals. In the absence of other reliable ev-

155. *See* note 150 *supra*. Of course, the rational basis requirement plays an important role in motivation analysis. This statement is the thrust of the argument in the first half of this section. Perhaps future writings will succeed in explicating the normative basis of an independent rationality requirement. *See, e.g.*, Bice, Rationality in Constitutional Law (in process) (unpublished manuscript on file with Prof. Bice, University of Southern California Law Center). No intelligible explication has yet to be provided.

156. *See* authorities cited in notes 150-51 *supra*.

idence, the effect will be the only evidence of goals, and even when other evidence is available, the effect remains probative. To revert to the statement of the norm, if effect *Not A* is the only evidence of the goal, we or a court would normally infer that the goal was also *Not A*. If other evidence, like legislative history or a representation of counsel, suggested that *A* was in fact the goal, we would then be faced with a choice of inferences: Either the legislature did not have sufficient wit to accomplish that which it sought, or the legislative history or counsel's representation is misleading. In choosing between these two inferences, we face an irony: If the mistake in selecting means really was obvious, it often becomes unbelievable that the legislature would have made it, while if the mistake was less obvious, whether a court may properly overturn the legislative judgment is unclear. In sum, as the mistake becomes more obvious, and thus judicial intervention more justifiable, the appropriate inference also becomes more obvious—namely, that this other evidence of the goal is misleading—perhaps, for example, that the legislative history is incomplete, that counsel is mistaken, or that one or the other was simply "hiding something." Because that "something" will often be a constitutionally impermissible goal, "rationality" analysis can play an evidentiary role in flushing out real motivation; but the unconstitutionality of such a legislative or administrative action is accounted for by the various norms prohibiting the government from pursuing certain goals—including that barring racial prejudice—not by the clear mistake norm.

In order to transform the rational basis requirement into a meaningful, independent norm, one must arrive at an explanation of why inferring goals from effects is sometimes constitutionally unacceptable. Perhaps the best-known attempt at such an explanation is Professor Ely's. He suggests that in order to be acceptable, an alleged goal must be one about which a "consensus" exists that it is the sort of goal generally served by laws of the type at issue.[157] Thus, Ely explains why the exemption of certain seafood and agricultural trucks from a law requiring commercial carriers to post security against liability for injuries caused by their negligence was "irrational," notwithstanding the fact that it produced the effect and therefore was rationally related to the goal of subsidizing the favored industries: The law was a motor-vehicle regulation of the sort about which a consensus exists that it must serve "traffic safety" goals, and the challenged distinction was *not* rationally related to any such goal.[158]

157. *Motivation*, *supra* note 1, at 1224-28.
158. *Id.*, at 1225-26.

Although Professor Ely's explanation is unacceptable to me, it does contain an important insight. It is unacceptable because there seems no basis whatever in the Constitution to suppose that a legislature is prohibited from pursuing both economic and traffic safety goals in its motor-vehicle code, or indeed, both traffic safety and economic goals in its taxing and spending programs. The insight nonetheless remains: A "consensus" of sorts exists about which kinds of goals different governmental actions usually serve. This point is important not, as Professor Ely thought, for normative reasons, but rather for evidentiary ones.

The plausibility of a racially innocent explanation of a law or other governmental action that produces significant racially disproportionate effects depends upon the extent to which the explanation corresponds to what we know from experience about the way in which things happen or are done in our society. Explanations that, given the action and its effects, are "contextually peculiar" in the light of this experience should be treated with extreme skepticism by the courts.[159] Existing racial equal protection case law suggests that the courts basically understand the suspiciousness of contextually peculiar explanations, but less clear is whether they understand how this phenomenon relates to so-called rationality analysis, and it is correspondingly unclear whether they understand all the implications of contextual peculiarity.

To put the matter briefly, among the many things that we know from experience are the ways in which government institutions normally behave. In the face of evidence of significant racially disproportionate effects, an explanation that would require us to believe that an institution behaved quite differently from its usual way is a contextually peculiar explanation and should be treated skeptically. Some of the things we know about the normal behavior of government entities can be of evidentiary significance in racial equal protection suits, for example, that both legislative and administrative institutions generally follow their own rules or customary practices. Further, both types of institutions normally pursue certain kinds of goals through certain kinds of means. Administrative bodies also usually act on the basis of considerations that are within the scope of their delegated authority and

159. Professor Ely's rich discussion has stimulated many of the ideas about contextual peculiarity in this article. *Id.*, at 1230-49.

over time behave relatively consistently. The point is not that institutional behaviors that deviate from these normal patterns are irrational and that a deviation itself is unconstitutional, but rather that such deviations are relevant and sometimes very probative evidence that actions producing disproportionate racial effects were motivated by racial prejudice.

The courts have been perhaps most willing to infer prejudiced motivation from disproportionate impact plus contextually peculiar claims of innocent motivation in cases involving jury selection. A showing that juries in a locality have historically included a significantly lower proportion of blacks than does the juror pool for all practical purposes spells unconstitutionality, notwithstanding a government explanation that selection from the pool was random.[160] Of course, chance possibly explains the disproportion, but this outcome would be quite peculiar, just as it is possible but peculiar that a flipped coin would turn up heads significantly more times than tails when flipped often enough.

The timing of an action that produces a racially disproportionate effect may also sometimes preclude the government from explaining the action in any but a contextually peculiar way. The racially gerrymandered boundary struck down by the Supreme Court in *Gomillion v. Lightfoot*[161] is an example. The mere fact that boundaries divide communities of different racial mixtures is not itself unconstitutional, and because political boundaries often are drawn piecemeal over time and for a wide variety of nonrational but racially innocent reasons, a governmental defendant will usually be able to provide a credible non-racial explanation for why the boundary is where it is. However, none of these usual explanations were available to explain the *Gomillion* statute that altered "the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure,"[162] and any attempt by the government to fabricate a non-racial explanation would have been so contextually peculiar as to be unbelievable.

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160. The cases are legion. Among the Court's recent discussions are Washington v. Davis, 426 U.S. 229, 239-40 (1976); Alexander v. Louisiana, 405 U.S. 625, 628-33 (1972). Perhaps the Court's most open acknowledgement came in Hernandez v. Texas, 347 U.S. 475 (1954):

> Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years.

Id. at 482.

161. 364 U.S. 339 (1960).

162. *Id.* at 340.

The realization that contextually peculiar government behavior will be regarded as suspicious probably plays at least an implicit role in cases involving historical patterns of administrative action that have over time produced significantly disproportionate racial effects. *Yick Wo v. Hopkins*[163] is the classic illustration of disproportionate impact in this context. In this case the Oriental plaintiff challenged the denial of his laundry license application, showing that the licensing board had over several years denied virtually all applications by Orientals and virtually none by whites. The government did not even attempt a non-racial explanation.

In theory at least, in a case like *Yick Wo*, the government could try to explain the disproportion on the basis that the agency each week or day over, say, a five-year period changed its licensing policies back, forth, and sideways for reasons unrelated to race, such that each of the apparently racially based denials could be correlated with an alleged non-racial policy shift. One reason that state governmental defendants do not often attempt such explanations is probably that the requisite non-racial explanations could not be made without claiming that the agency took into consideration policy matters that, though allegedly non-racial, were beyond the scope of its state-delegated authority.[164] Another reason that such explanations are not often attempted is probably that counsel realizes that an explanation predicated on weekly or daily policy shifts—even if within the agency's lawful authority—would be re-

163. 118 U.S. 356 (1886).

164. For example, there is substantial reason to suspect that a similar problem played an important role in the famous case of Railway Express Agency v. New York, 336 U.S. 106 (1949), though obviously not in a racial discrimination context. In the New York state courts, Railway Express had challenged the regulation prohibiting advertising for hire on trucks, alleging the regulation was beyond the authority of the police commissioner who promulgated it. The opinion of the New York Court of Special Sessions clearly shows that in order to survive this state law challenge, the regulation had to be found to bear "a reasonable relationship to the subject of traffic control and public safety." 188 Misc. 342, 346, 67 N.Y.S.2d 732, 736 (Ct. Spec. Sess. 1947). Similarly, the three dissents from the judgment of the New York Court of Appeals sustaining the regulation dissented on the ground that it "is so entirely unrelated to traffic control as to be arbitrary as a matter of law." 297 N.Y. 703, 705, 77 N.E.2d 13, 13 (1947). In other words, if Railway Express had argued in the state courts, as Justice Jackson was later to suggest in his concurring opinion in the United States Supreme Court, that the purpose of distinguishing between advertising for self and for hire was, in effect, to promote or subsidize self-advertisers, there is a substantial probability that the classification would have been found beyond the authority of the police commissioner. Having avoided this argument in the state courts, counsel for Railway Express were presumably, at a minimum, somewhat reluctant to make it in the Supreme Court.

garded as extremely peculiar and therefore suspicious. Needless to say, were the government to attempt a racially innocent explanation based on policies beyond the authority of the institution at issue, or on some claimed bizarre manner of proceeding, the courts *should* be extremely skeptical—the more so the greater the racially disproportionate effect sought to be explained away. Such explanations would not always be unbelievable for federal racial equal protection purposes, but the courts should insist upon clear and convincing proof that the claimed peculiar practice rather than racial prejudice really prompted the action.

Because the scope of an institution's authority is evidentially relevant in appraising the credibility of allegedly innocent reasons for actions producing racially disproportionate effects, the probability that a plaintiff will be able to establish prejudiced motivation successfully is to some extent dependent upon the particular institution he is challenging. Generally speaking, administrative actions will be easier to challenge than legislative ones, and those of narrowly rule-bound agencies easier than those of agencies with far-ranging discretion. This phenomenon, familiar to students of equal protection litigation,[165] is explainable *not* because legislatures are in any sense immune from the motivation inquiry but because their greater range of discretion produces more complicated evidentiary consequences. Of course, the concept of contextual peculiarity is *not* irrelevant to legislative actions; rather, the difference is only that proof problems in connection with legislation will sometimes be more complex.

To take a stark example, consider an employment rule promulgated by a police board requiring police applicants to pass a test about opera or world history. Assume that the test, like the one in *Washington*, disqualifies blacks at four times the rate of whites. The board might try to dispel the inference of prejudiced motivation in either of two ways: First, it might claim that the test's goal is to encourage the population to appreciate or learn opera or world history by holding out public employment as a reward for such knowledge; second, it might argue that its goal is a better police force, in that well-rounded police officers are likely to be more understanding, to improve morale among their comrades, and to present a more positive image to the public.

The first or "general education" explanation is simply beyond the police board's authority, for it is neither a legislature nor a board of education. If the police board is a federal one, a federal court should invalidate the test on this ground without reaching

165. *See Motivation*, *supra* note 1, at 1284-89.

the equal protection issue. If it is a state board, this contextually peculiar explanation should carry little if any probative force on the question of prejudiced motivation.

The second explanation is presumably within the scope of the board's authority, but it is nonetheless contextually peculiar. Neither opera nor world history knowledge is ordinarily regarded as relevant or prerequisite to police work. To avoid an inference that racial prejudice caused either the test's adoption, continued use, or both, the government should be required to provide clear and convincing proof that either general education or hiring "better" police officers is the test's real purpose, as for example, evidence clearly and unambiguously showing the conditions that led to its adoption and continued use and/or empirical evidence establishing a reliable factual basis for both the board's conception of who is a good police officer and the test's predictive value to this end. Such proof should be required, not because the test is "irrational," but because the innocent explanation alone is too peculiar to dispel an inference of prejudice. If the test produces no significant racially disproportionate or other suspicious effects, the police board's decision on who are and how to test for good police officers ought to be, I believe, of no constitutional concern. Peculiarity, indeed bizarreness, implicating no identifiable constitutional value, is both a benefit and cost of decentralized government operating under a separation of powers, and the federal courts have no monopoly on wisdom.

Now, suppose that the same test, producing the same racially disproportionate effect, were required by a state legislature. Legislative bodies obviously have much greater discretion under state law to pursue wide-ranging goals than do administrative agencies, and assuming no aberrant state constitutional restriction, both the general education goal of encouraging people to learn opera or world history and the specification of the characteristics of good police officers are goals well within state legislative power. Because the legislature has the authority to pursue both ends, it is marginally more believable that the first might in fact have been the test's actual goal. In this sense the evidentiary issues may be somewhat more complex, and the plaintiff faces a marginally greater difficulty in proving his case.

Nonetheless, both goals remain contextually peculiar—the good police officer for precisely the same reasons as with the police board example and the general education goal because such ends

are not usually pursued through employment regulation. To dispel the presumption of prejudice created by the disproportionate impact, the government should have to make the same sort of clear and convincing showing that either or both of the goals are the real reason for the test's adoption and continued use.

Just as an action's contextual peculiarity is to some extent dependent on the particular institution challenged, it is also dependent—perhaps even more so—on the type of law or action at issue. The reason is that experience indicates governments generally pursue a wider variety of goals through some types of actions than through others. The wider the variety usually pursued, the less likely that a claim of innocent motivation will be contextually peculiar, and therefore, the more difficult will be a plaintiff's task in attacking the action as racially prejudiced.

Perhaps the best examples are taxing and spending programs. One of the reasons that such programs are relatively immune from federal constitutional attack is that we are so accustomed to their use to achieve a wide variety of goals that few if any goal claims are contextually peculiar. Thus, a subsidy for opera performances, though it might well disproportionately advantage whites relative to blacks, would be virtually impossible to attack successfully on racial equal protection grounds without additional evidence of motivation. The goal of subsidizing opera is simply to promote the general welfare by encouraging activities that the legislature believes valuable, and there is nothing peculiar or suspicious about such a goal.

Although taxing and spending programs are perhaps the clearest examples of actions from which inferences of a goal's contextual peculiarity are unlikely, the greatest limitation on the utility of this kind of evidence arises from the obvious fact that many goal claims in connection with numerous different kinds of action will simply not be implausible on the surface. However, with regard to actions that produce significant racially disproportionate effects, a plaintiff should sometimes be able to discredit a nonpeculiar, innocent goal claim by proving that the goal could have been accomplished through reasonably available alternative means that would have produced a significantly less disproportionate effect.

The probative value of this kind of evidence on prejudiced motivation, as we discussed in connection with benign classifications, is dependent on the extent to which such means would produce costs or policy tradeoffs that were not entailed by the means actually used, for failure to employ alternatives can be based on the legitimate desire to avoid goal frustration, increased costs, or un-

wanted policy effects. However, the question whether an apparent alternative means was reasonably available in this sense cannot usually be answered as if it were a problem in mathematics. In cases in which the plaintiff has first proved that the action produces a clear and significant segregation of or disadvantage to a minority racial group and then produces further evidence sufficient to warrant an inference that the innocent goals the government claims for the action could be accomplished through reasonably available alternative means, the government should be obliged to supply a credible explanation, supported by evidence when indicated, about why this alternative was not employed.

Proof of a substantial disproportionate effect combined with evidence that an action's claimed innocent goal could reasonably have been or could now be accomplished by means producing less racial disadvantage to this minority group warrants an inference that the action would not have been taken or continued but for racial prejudice. This is not to say that such evidence necessarily indicates that the action was taken or continued "for the goal" of, say, segregating or disadvantaging blacks. We have noted earlier that prejudice affects actions in ways other than as a conscious goal: It can also skew decisionmakers' perceptions and evaluations of that which they consciously perceived as non-racial costs and benefits. Evidence that such goals could as well have been pursued in less racially hurtful ways with no significant sacrifice or added costs suggests at the least that prejudice may have played or be playing such a skewing role.

Proof of this sort might be thought inadequate to support a finding of prejudiced motivation without some independent evidence suggesting that the institution that took the action had knowledge of the disproportionate impact that it would produce and of the availability of the alternatives. Without debating the extent to which it is generally fair to assume that institutions have this kind of knowledge—at least in recent years many probably do—the institution will learn these facts, at the latest, when brought into court by a plaintiff, and its subsequent refusal to change or modify the challenged action is itself an equal protection violation if motivated by racial prejudice (though, of course, the time of violation may affect the remedy that the plaintiff is

seeking).[166]

Although evidence of reasonably available alternatives can sometimes be successfully deployed to prove prejudiced motivation, such evidence is of relatively little use with respect to governmental actions that are customarily used to achieve a wide variety of goals. In other words, the usefulness of this sort of evidence is subject to the same general constraints as is evidence of contextual peculiarity, and for this reason it will usually not be helpful in attacks on taxing, spending, and many regulatory programs.

Consider, for example, a government decision to terminate a particular spending program or to spend funds in one way rather than another. Although decisions like these may disadvantage blacks relative to whites, they are often made for non-racial, fiscal and/or very specific general welfare goals. A program may be discontinued simply to lower taxes or because the legislature believes that the general welfare would be better served by subsidizing opera rather than by adding an increment to the mass transit system. Similarly, raising the sales tax or requiring that automobile manufacturers install emission control devices may disproportionately disadvantage lower-income people and therefore blacks relative to whites. However, such decisions often reflect complex non-racial goal compromises that are not contextually peculiar. Because innocent goals like these are not contextually peculiar for these kinds of governmental actions, the government will offer them in explanation of the disproportionate impact, and it will be virtually impossible to prove that fiscal, specific general welfare, or compromise goals could be as well served by alternative means without added costs or unwanted effects.

Evidence of reasonably available alternatives is most useful in proving motivation when, because of the kind of institution and action at issue, the challenged action may only plausibly be claimed to have a limited number of relatively narrow goals. As a practical matter, the suspiciousness of contextually peculiar claims of innocent motivation operates in tandem with less restrictive alternative evidence to give rise to an inference of racially prejudiced motivation.

Local school board decisions on locating attendance zone lines, placing new schools, or designating busing routes are examples of governmental actions that can sometimes be shown to have been

166. Plaintiff would not be entitled to money damages, for example, unless he proved the past action he challenges was racially prejudiced. *See* the discussion of state action, note 34 *supra*. For a discussion of Washington v. Davis, *see* notes 173-74 and accompanying text *infra*.

affected by racial prejudice by means of evidence of disproportionate segregatory effect plus the availability of reasonable alternative means.[167] Thus, a claim that one or several of these decisions were taken in furtherance of a neighborhood school policy should be disbelieved if the plaintiff can prove that approximately the same school populations, walking distances, and safety and transportation costs could have been accomplished through alternative attendance zones, school locations, and bussing routes and that these alternatives would have significantly reduced racial segregation. Moreover, even if the plaintiff could not show that all these objectives could have been substantially accomplished through less segregatory alternatives without additional cost, evidence of the contextual peculiarity of one or more of the claimed innocent goals might permit the court to infer racial prejudice. If one or all of several allegedly innocent goals are, for example, beyond the scope of the school board's authority, or not the kinds of goals usually pursued by the methods employed, or fairly clearly inconsistent with the school board's historical practices or with conditions currently existing in other parts of the district, a court should treat the defense skeptically.[168] Suppose, for instance, that an alternative arrangement is available that would substantially satisfy all the school board's alleged goals without added costs, except that some students would have to walk a somewhat greater distance than the board claims is consistent with district policy. A showing that in other parts of the district, not realistically distinguishable from the area at issue, students are currently walking the greater distance should, absent some credible non-racial explanation by the defendant, lead a court to disbelieve the claimed walking distance goal and to infer racially prejudiced motivation from the disproportionate impact and reasonably available alternatives.

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167. Many lower courts appear to rely on such evidence in school desegregation cases. *See, e.g.*, United States v. Texas Educ. Agency, 532 F.2d 380, 389 (5th Cir.), *vacated and remanded per curiam sub nom.* Austin Independent School Dist. v. United States, 429 U.S. 990 (1976). For a collection of other cases in which less restrictive alternative evidence played a role, see Note, *Reading The Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 338 n.95 (1976).

168. Contextual peculiarity has occasionally been relied upon by courts in school desegregation cases. *See, e.g.*, United States v. School Dist., 521 F.2d 530, 543 n.28 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975) (inference of segregative intent arises from use of freedom of choice plan in one area and neighborhood school policy in another).

It is worth emphasizing that a racially prejudiced school board's refusal to modify existing arrangements is as unconstitutional as is the original racially prejudiced promulgation of the arrangement.[169] Racial prejudice may have played no role whatever in the board's drawing attendance zones, for example, but a refusal to modify the zones in ways that would reduce segregation and nevertheless substantially accomplish all the board's non-racial and non-contextually peculiar goals should be found to be a product of racial prejudice. Evidence of a refusal to modify existing bus routes or to relieve demonstrable overcrowding at a school by moving students in ways reducing segregation should, in appropriate circumstances, lead to the same finding.

We should also emphasize that a difference exists between proof that reasonably alternative ways of accomplishing innocent goals were or are available and a bald claim by the plaintiff that there "must be some other way" to accomplish them. The latter simply has no probative value on past or present motivation. Moreover, even if joined with evidence that the means in use actually do not accomplish very well their stated goals, such a claim is not the probative equivalent of proof of reasonably available alternative means, and such evidence alone will often not be sufficient to warrant an inference that the disproportionate impact is a result of prejudice. Proof that a means does not very well accomplish its goals may indicate only that achieving the goals is difficult, and indeed in some cases the plaintiff's failure to produce evidence of alternatives may itself reflect the fact that no better means are known.

The imperfection of means is perhaps most endemic in connection with governmental actions the point of which is to predict the future behavior of individuals: Who will commit repeated crimes? Who will perform well in school or college? Who will be a good (or competent) lawyer, teacher, or police officer? The means we currently use for making these judgments are notoriously imperfect, but in many cases they are the best or as good as any known alternatives for accomplishing the goals for which such predictions are sought. Of course, the implicit goals are often either vague or a matter for legitimate dispute (What are the characteristics of a good lawyer?), but these matters are not of constitutional concern unless the goal choice was itself caused by prejudice or is offensive to some constitutional value; and proof that means imperfectly serve these goals, when no better means are known, does not ordinarily warrant an inference of prejudice.

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169. *See* note 34 *supra*.

This observation is not meant to suggest that such evidence has no value in extreme cases or that it cannot be useful when other evidence of prejudice exists, or even that evidence of a government entity's unwillingness to investigate whether alternative means may be available is always irrelevant to the question of prejudiced motivation. Quite the contrary, evidence that a means does not serve a goal significantly better than random choice establishes a reasonably available alternative and is very probative of prejudice. Proof of less imperfect means could well tip the scales if the plaintiff has produced other evidence of prejudice, as, for example, evidence of social context or legislative history. Evidence of significant disproportionate impact, very imperfect means, and a government refusal even to investigate the availability of alternatives would at least call for a credible explanation of the refusal, such as, for example, that others had unsuccessfully made such an investigation.

Moreover, in cases in which a major part of the responsibility of the government agency that took the challenged action includes continually assessing goals, means, and demographic data, arguably a showing of significant racially disproportionate impact should itself shift to the government the burden of establishing the absence of reasonable alternatives. Local school boards provide the prototypical example of this type of government institution. Perhaps such a shift in this burden is what Justice Powell had in mind when he suggested in his concurrence in *Keyes v. School District No. 1*[170] that school districts are constitutionally obliged to "implement their customary decisions with a view toward enhancing integrated school opportunities,"[171] and what moved the California Supreme Court to interpret the state's equal protection clause to require school boards to take "reasonably feasible" steps to reduce racial imbalance.[172]

A major part of a school district's responsibility includes the continual processing of demographic data bearing on likely population movement, and school authorities, as managers of an ongoing enterprise, constantly make short- and long-run means and goal choices having reciprocal effects on one another. A decision to buy land at one time affects the relative cost and hence the fu-

170. 413 U.S. 189 (1973).
171. *Id.* at 226 (Powell, J., concurring in part and dissenting in part).
172. Crawford v. Board of Educ., 17 Cal. 3d 280, 305-06, 551 P.2d 28, 45, 130 Cal. Rptr. 724, 741 (1976).

ture reasonableness of building schools at these or different locations—a fact that in turn affects the location of attendance zones designed to promote neighborhood schools and may indeed affect the choice of whether to strive for neighborhood schools at all, and so on. Because the school authorities' business is to make these choices in the context of information about demographic patterns, they are obviously in the best position to know which combination of choices will likely result in the least segregation consistent with other goals, and they can hardly claim that they were unaware of either the racial effects of their actions or alternative ways of pursuing non-racial goals. Correspondingly, it may be exceedingly difficult for a plaintiff to prove that any one choice or set of choices was affected by racial prejudice, given that the reasonableness of alternatives is to some extent itself a function of previous sets of choices. At the same time, it may well be that the entire ongoing management was skewed by racial prejudice, and the historical practices of many school boards support this possibility. For these reasons, a common sense basis exists for the notion of imposing a prospective continuing obligation on school authorities of the sort outlined by Justice Powell and the California Supreme Court, and of imposing on these authorities the burden of establishing that their ongoing pattern of choices was taken with a view toward minimizing segregation consistently with other goals.

Most governmental actions do not share these special characteristics. The choice of an employment qualification system, for example, is not integrally related to demographic patterns and does not necessarily involve any interlocking set of reciprocally related choices, and the question of reasonable alternatives does not require either analysis of a maze of interrelated and detailed decisions or access to information not reasonably available or understandable to the plaintiff. Consider *Washington v. Davis*.[173] The government's claim that the civil service reading comprehension test was adopted to help select those who would do well in the training program and make good police officers was not contextually peculiar. Common sense suggests that reading ability probably has something to do with trainability and with success on the job, and using such a test to screen potential employees is not unusual. Consequently, the government's explanation was sufficiently credible to offset the inference of prejudiced motivation from the proven disproportionate effect.

If in such a case the plaintiff comes forward with evidence suggesting that the test produces no better police officers than does

173. 426 U.S. 229 (1976).

random choice, or that there are other reasonably available ways of screening for good officers, an inference of prejudice in the test's adoption or past use would still not be warranted, for, absent evidence that the police board had knowledge of these facts, the assumption remains credible that it made the common sense judgment that reading comprehension is related to trainability and job success. If, as in *Washington*, the plaintiff is seeking a remedy based on an alleged past violation, she will therefore lose. However, evidence of available alternatives should shift to the government the burden of proving that a failure to change the test, now that it has this information, is explainable on some ground other than racial prejudice, as, for example, the unreliability of plaintiff's data, the significant goal frustration, or the added costs that the alleged alternative would entail.[174]

Some Concluding Observations on Causation

The Supreme Court's decision in *Mount Healthy City School District v. Doyle*[175] makes clear that in order to grant a plaintiff relief on the basis of a claim that governmental action was motivated by constitutionally impermissible considerations, a court must be persuaded that the government entity would not have reached the same decision but for the impermissible consideration. As stated by the *Doyle* Court, once the plaintiff has borne the burden of proving that the impermissible consideration was a "substantial" or "motivating" factor, the government must prove "by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."[176] The Court has indicated that the same approach is applicable in racial equal protection suits,[177] and this issue deserves brief but necessarily incomplete attention here.

Whether any independent "causation" issue will exist in the case depends on the kind of evidence from which the court infers that racial prejudice affected the action. When this inference is

174. In *Washington* itself, of course, there appeared to be no claim that the police department was unconcerned about the current plight of black applicants, for the department had, since 1969, engaged in an affirmative program to recruit blacks and hire those passing the test. *Id.* at 235, 246.

175. 429 U.S. 274 (1977).

176. *Id.* at 287.

177. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

based upon the probative value of the challenged rule or action itself, as in the case of racially overt rules, or upon evidence of significant disproportionate effects in combination with circumstantial disproof of all the government's innocent goal claims, no separable causation issue will arise. In cases in which the inference of prejudiced motivation is based upon evidence showing that racial considerations were among those taken into account in the decision process, or upon circumstantial disproof of some but not all the government's innocent goal claims, a separate causation issue will exist, and the important questions involve the kinds of government evidence that should be sufficient to dispel the inference of prejudice.

In cases involving challenges to racially overt rules, the questions whether racial prejudice affected the decision process at all, and if so, whether the action would have been taken but for this prejudice, usually merge. A rule or action that is symptomatic of prejudice or that singles out a racial group for clear disadvantage creates a strong presumption, for reasons that we have discussed, both that prejudice played a role in the process *and* that this role was causal. In order to disprove either of these presumptions, the government must meet the necessary to a compelling goal standard. Similarly, determining whether a facially benign racially overt rule would have been enacted but for racial prejudice will ordinarily present no separable causation question, except for subgroup prejudice claims that, as we have noted, are really a species of covert discrimination attack. Generally the fact will be clear and admitted that the action would not have been taken but for racial considerations, and the question is whether these considerations were benign or prejudiced.

Covert discrimination claims are more complex. In connection with our discussion of the kinds of evidence usually available to prove that racial prejudice affected an action, we observed that some kinds of evidence function to create inferences that discredit innocent goal claims and others to create inferences that prejudice was among the considerations in the decision process.[178] In the preceding section of this article, we examined at length two kinds of evidence that discredit innocent goal claims—the contextual peculiarity of claimed goals and the availability of reasonable alternatives.

An inference of contextual peculiarity may arise either as a matter of judicial notice or on the basis of plaintiff's evidence and may consist of any of several different types of information that

178. *See* notes 115-27 and accompanying text *supra*.

suggest the government's innocent goal claim is so contextually peculiar as to warrant disbelief, for example, that the claimed goal is not usually pursued through actions of the type at issue, that it is beyond the delegated authority of the challenged institution, or that it is inconsistent with the institution's historical policies or practices.[179] Our point was to demonstrate that evidence of this sort or of reasonably available alternative means can sometimes, in conjunction with proof of significant disproportionate impact, support a finding of prejudiced motivation. The reason for this conclusion is that such evidence disproves the government's innocent goal claims and thus leaves unrebutted the inference of prejudiced motivation that arises from disproportionate impact. In cases in which the plaintiff relies on evidentiary inferences of this sort, no separate causation question will arise. If the government has supplied no credible, nonprejudiced explanation of the action, the appropriate inference is simply that the action was taken, or at least continued in force, because of racial prejudice.

Causation arises as an independent question when the plaintiff, in addition to disproportionate impact, relies only on evidence that functions to create an inference that prejudice was among the considerations taken into account. Evidence of this sort includes, for example, assigning a racially prejudiced reason as one basis of an administrative or judicial decision, omitting some required or customary procedure in the decision process, proving that the action was taken in a racially prejudiced social-political context, or providing evidence of prejudice in the institution's information-gathering or deliberative process. These and similar kinds of evidence create inferences that racial prejudice *played some role* in the decision process, but they do not disprove that innocent goals also played some role. The important question, therefore, is whether the action would have been taken but for the effects of prejudice.

Thus whether a separate causation question exists is, like all the other problems we have considered, a function of the evidence upon which the plaintiff relies. If a government agency discharges a black employee for the alleged reason that he was late for work several times, the employee, in order to prove an equal protection violation, might rely on circumstantial evidence suggesting that white employees who were similarly tardy were

179. *See* notes 157-66 and accompanying text *supra*.

never fired, but that blacks always were, even when they were not tardy. Successful proof by the plaintiff simultaneously establishes that prejudice played a role in his firing *and* that it played a causal role. If, instead, the government agency fires the employee for the stated reason that he is black *and* was tardy, the plaintiff need only establish this fact, and, under *Mount Healthy* and *Arlington Heights*, the burden shifts to the government to prove he would have been fired only for being tardy.

The important question is what sort of governmental evidence should discharge this burden, given varying configurations of disproportionate impact, varying kinds of evidence that prejudice affected the decision process, and varying types of governmental actions and innocent goal claims. This subject is beyond the scope of this already overly long article, but the moral of this story is consistent with that of the larger one: *The important questions are all evidentiary.*